

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

KING-DEVICK TEST INC., Plaintiff, vs. NEW YORK UNIVERSITY, NYU LANGONE HOSPITALS, STEVEN L. GALETTA, and LAURA J. BALCER Defendants.	Civil Action No. 17-cv-9307 Honorable J. Paul Oetken, U.S.D.J Honorable Debra C. Freeman, U.S.M.J
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**DECLARATION OF DAVID KLUFT IN SUPPORT OF
OPPOSITION TO MOTION FOR ISSURANCE OF REQUEST TO REGISTER OF
COPYRIGHTS PURSUANT TO 17 U.S.C. § 411(b)(2)**

I, David A. Klufft, swear and state as follows:

1. I am an attorney with the firm of Foley Hoag LLP and counsel to Plaintiff King-Devick Test Inc. the above-captioned matter. I submit this declaration in support of Plaintiff's Opposition to Defendant's Motion for Issuance of Request of Register Of Copyrights Pursuant to 17 U.S.C. § 411(b)(2).

2. Attached hereto as **Exhibit 1** are true and correct excerpts of the transcript from the deposition of Dr. Alan King.

3. Attached hereto as **Exhibit 2** are true and correct excerpts of the transcript from the deposition of Dr. Steven Devick.

4. Attached hereto as **Exhibit 3** are true and correct excerpts of the transcript from the deposition of Professor Darrell Schlange.

5. Attached hereto as **Exhibit 4** are true and correct excerpts of the transcript from the deposition of Christine Weber.

6. Attached hereto as **Exhibit 5** is a true and correct copy of the Supplemental Declaration of Allen H. Cohen, O.D.

7. On September 25, 2018, Defendants issued a subpoena for deposition testimony from Herbert J. Bell, a lawyer who filled out the 1983 copyright application for the King-Devick Test. I subsequently spoke with Mr. Bell, who confirmed that he was served with the subpoena. Defendants did not take this deposition.

I declare under penalty of perjury that the foregoing is true and correct, based on my personal knowledge, and that this declaration was executed by me on February 8, 2019 in Boston, Massachusetts.



David A. Kluft
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Boston, Massachusetts 02210
(617) 832-1000
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 8, 2019, a true and correct copy of the foregoing document has been served on counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system.

/s/ David A. Kluft

EXHIBIT 1

Page 1

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

KING-DEVICK TEST, INC.,
Plaintiff,

V. Civil No:1:17-cv-09307

NYU LANGONE HOSPITALS, NEW YORK
UNIVERSITY, STEVEN L. GALETTA, and
LAURA J. BALCER,
Defendant.

VIDEOTAPED DEPOSITION
OF

DR. ALAN KING

October 19, 2018

1:47 p.m.

LOCATION: Radisson Hotel Bismarck
Empire Conference Room
605 East Broadway Avenue
Bismarck, North Dakota 58501

REPORTER: KAYLA A. RICHMOND

DIGITAL EVIDENCE GROUP
1730 M Street, NW, Suite 812
Washington, D.C. 20036
(202) 232-0646

<p>1 A. I guess, yes, I did look at documents with him.</p> <p>2 Q. When did you look at documents with your</p> <p>3 attorney?</p> <p>4 A. Last night.</p> <p>5 Q. And did any of those documents refresh your</p> <p>6 recollection about any facts about this case or about --</p> <p>7 A. Not really.</p> <p>8 Q. Did you speak with anyone other than your</p> <p>9 attorney about this case?</p> <p>10 A. No.</p> <p>11 Q. Have you spoken to Mr. Devick about this case?</p> <p>12 A. Yes.</p> <p>13 Q. When did you speak to him?</p> <p>14 A. He called me a couple of weeks ago and told me</p> <p>15 he was going to be here.</p> <p>16 Q. Did you speak to him before you were subpoenaed</p> <p>17 for a deposition about this case?</p> <p>18 A. No.</p> <p>19 Q. Did you speak with anyone else other than your</p> <p>20 attorney and Mr. Devick?</p> <p>21 A. No.</p> <p>22 Q. When you spoke to Mr. Devick a few weeks ago,</p> <p style="text-align: right;">Page 10</p>	<p>1 now.</p> <p>2 Q. And what's your role in the company?</p> <p>3 A. I'm an optometrist.</p> <p>4 Q. And have you always been an optometrist in the</p> <p>5 practice?</p> <p>6 A. Yes.</p> <p>7 Q. Have you worked for any other companies before</p> <p>8 you worked for Visionary Eye Care?</p> <p>9 A. I've always been a solo practitioner.</p> <p>10 Q. Do you have a college degree?</p> <p>11 A. Yes.</p> <p>12 Q. What degree do you have?</p> <p>13 A. I have a bachelor of science from the University</p> <p>14 of North Dakota.</p> <p>15 Q. And what year did you graduate from the</p> <p>16 University of North Dakota?</p> <p>17 A. 1972.</p> <p>18 Q. Do you have any graduate degrees?</p> <p>19 A. I have an OD Degree. I graduated from the</p> <p>20 Illinois College of Optometry in 1976.</p> <p>21 Q. What's an OD degree?</p> <p>22 A. Doctor of optometry.</p> <p style="text-align: right;">Page 12</p>
<p>1 what did you speak about?</p> <p>2 A. He told me was going to be here today.</p> <p>3 Q. And Was that all that you discussed in that</p> <p>4 call?</p> <p>5 A. Basically.</p> <p>6 Q. Was there anything else that you discussed?</p> <p>7 A. He told me that we -- I asked him what the case</p> <p>8 was about and he told me we were getting screwed. That</p> <p>9 was the end of the conversation.</p> <p>10 Q. You didn't -- did he tell you anything about the</p> <p>11 defendants in the case?</p> <p>12 A. No.</p> <p>13 Q. Did he tell you about what the claims were in</p> <p>14 the case?</p> <p>15 A. No.</p> <p>16 Q. Dr. King, are you employed?</p> <p>17 A. Yes.</p> <p>18 Q. What company do you work for?</p> <p>19 A. Visionary Eye Clinic in Dickinson, North Dakota.</p> <p>20 Q. How long have you worked there?</p> <p>21 A. Well, I owned the business for 42 years or 40</p> <p>22 years. I sold it three years ago and I work for them</p> <p style="text-align: right;">Page 11</p>	<p>1 Q. And does that mean that you're an eye doctor?</p> <p>2 A. Yes.</p> <p>3 Q. And you said you graduated in 1976?</p> <p>4 A. Yes.</p> <p>5 Q. Were you in the same graduating class as Steve</p> <p>6 Devick?</p> <p>7 A. Yes.</p> <p>8 Q. When did you first meet Mr. Devick?</p> <p>9 A. 1972.</p> <p>10 Q. How did you meet him?</p> <p>11 A. In school. We were in the same class.</p> <p>12 Q. What class were you in together?</p> <p>13 A. Well, all your classes when you're in optometry</p> <p>14 school -- everybody takes the same classes at the same</p> <p>15 time. So we were in all of our classes together.</p> <p>16 Q. Do you recall how many students were in your</p> <p>17 class?</p> <p>18 A. 150.</p> <p>19 Q. Did you do any research while you were at</p> <p>20 optometry school?</p> <p>21 MR. KLUFT: Object to the form. You can</p> <p>22 answer.</p> <p style="text-align: right;">Page 13</p>

<p>1 A. Yes.</p> <p>2 Q. What type of research did you do?</p> <p>3 A. Well, most of the research we did was when Steve</p> <p>4 and I decided to develop the King-Devick Test.</p> <p>5 Q. When did you start that research?</p> <p>6 A. I don't recall.</p> <p>7 Q. Was this research for a class?</p> <p>8 A. It was for our senior research project.</p> <p>9 Q. What's a senior research project?</p> <p>10 A. Everybody who graduates from optometry school</p> <p>11 has to do a doctoral thesis and it's called a senior</p> <p>12 research project. And so Steven and I decided to</p> <p>13 corroborate on this test.</p> <p>14 Q. Is it -- is it something that you have to do</p> <p>15 field research or is it writing a paper?</p> <p>16 A. Both.</p> <p>17 Q. And who decided to work with the other? Did you</p> <p>18 decide to work with Mr. Devick or did he approach you to</p> <p>19 work with him on this research?</p> <p>20 MR. KLUFT: Object to the form. You can</p> <p>21 answer.</p> <p>22 A. I have no idea. I don't really remember. It was</p> <p style="text-align: right;">Page 14</p>	<p>1 functions where your eyes jump from one spot to another.</p> <p>2 Q. So how is that different from the continuous</p> <p>3 pursuit?</p> <p>4 A. Well, you don't use continuous pursuit in</p> <p>5 reading you -- that's -- that's something that you like</p> <p>6 following a baseball. But if you're reading, you're</p> <p>7 using saccadic fixations.</p> <p>8 Q. Where did you first learn about saccadic</p> <p>9 fixations?</p> <p>10 A. In class.</p> <p>11 Q. And what did you learn in class?</p> <p>12 A. There was a test called the Pierce Saccade Test</p> <p>13 that we -- that was being taught at the school.</p> <p>14 Q. What is a saccade?</p> <p>15 A. I just told you. Saccade is going from one spot</p> <p>16 to another.</p> <p>17 Q. So is a saccades the same as a saccadic</p> <p>18 fixation?</p> <p>19 A. Yes.</p> <p>20 Q. Before you started your research project, did</p> <p>21 you research other eye movement exams?</p> <p>22 A. Do not recall.</p> <p style="text-align: right;">Page 16</p>
<p>1 42 years ago.</p> <p>2 Q. Was there a professor that advises you for your</p> <p>3 senior research project?</p> <p>4 A. Yes.</p> <p>5 Q. Who was that professor?</p> <p>6 A. Dr. Darrell Slangy.</p> <p>7 Q. And was he your professor for any other classes?</p> <p>8 A. Yes.</p> <p>9 Q. What classes?</p> <p>10 A. No recollection.</p> <p>11 Q. Did everyone in your class do a senior research</p> <p>12 project in a pair?</p> <p>13 A. No.</p> <p>14 Q. Can you just tell me generally what your</p> <p>15 research, the senior research paper was about?</p> <p>16 A. Detecting reading disabilities by testing</p> <p>17 saccadic functions of the eye.</p> <p>18 Q. What is a saccadic function?</p> <p>19 A. It's the eye movements that you use when you --</p> <p>20 when you go from -- when you're reading a line of paper,</p> <p>21 your eyes go in saccadic fixations, not continual</p> <p>22 pursuits, but they go in saccadic, sporadic saccadic</p> <p style="text-align: right;">Page 15</p>	<p>1 Q. Did you review the literature in that area of</p> <p>2 research?</p> <p>3 A. Yes.</p> <p>4 Q. Do you recall what -- what books or papers that</p> <p>5 you reviewed?</p> <p>6 A. I don't recall.</p> <p>7 Q. You mentioned the Pierce Saccade Test, what is</p> <p>8 the Pierce Saccade Test?</p> <p>9 A. It was a -- a paper produced by a professor of</p> <p>10 optometry and not sure where he was that he developed</p> <p>11 the Pierce Saccade Test which he thought tested saccadic</p> <p>12 functions.</p> <p>13 Q. And why do you say he thought?</p> <p>14 A. Because he was wrong.</p> <p>15 Q. Why was he wrong?</p> <p>16 A. He didn't -- how do I go about this explaining</p> <p>17 it. His test was designed so you just go from one point</p> <p>18 to another, it didn't really test the saccadic function.</p> <p>19 It actually tested pursuits more than it did that. So it</p> <p>20 didn't mimic the reading process.</p> <p>21 Q. So to mimic the reading process, would you need</p> <p>22 to be looking at more than two items on a line?</p> <p style="text-align: right;">Page 17</p>

<p>1 A. Yes.</p> <p>2 Q. Do you recall when you first learned about the</p> <p>3 Pierce Saccade Test?</p> <p>4 A. I don't remember.</p> <p>5 Q. Do you recall if you learned about it in class?</p> <p>6 MR. KLUFT: Objection. Asked and</p> <p>7 answered. You can answer.</p> <p>8 A. I believe it was in class, yes.</p> <p>9 Q. Do you recall who the professor was?</p> <p>10 A. No.</p> <p>11 Q. Were there any similar saccadic tests that you</p> <p>12 studied in class?</p> <p>13 A. Not that I know of.</p> <p>14 Q. Are you familiar with a test called the Vincett</p> <p>15 Test?</p> <p>16 A. No.</p> <p>17 Q. Dr. King, I'm handing you what's marked as</p> <p>18 exhibit two. And this has on the bottom right, a bates</p> <p>19 number. This is just an identifier that shows, you know,</p> <p>20 what number this document is. This is - this document</p> <p>21 has bates number NYU00469222. So just take a look at</p> <p>22 this document and obviously it's -- it's got multiple</p> <p style="text-align: right;">Page 18</p>	<p>1 with a vision test called the Gilbert Test?</p> <p>2 A. No.</p> <p>3 Q. Are you familiar with an optometrist named</p> <p>4 Luther Gilbert?</p> <p>5 A. No.</p> <p>6 Q. When you were working on your research, your</p> <p>7 senior research project with Mr. Devick, were there any</p> <p>8 other tests that involved reading numbers or letters</p> <p>9 that you studied?</p> <p>10 A. No.</p> <p>11 Q. So after you studied the Pierce Saccade Test,</p> <p>12 what did you do next for your research study?</p> <p>13 MR. KLUFT: Object to the form. I think it</p> <p>14 mischaracterizes testimony, but you can answer.</p> <p>15 A. I'm not sure what you're asking.</p> <p>16 Q. Sure. I'll rephrase the question. Well, describe</p> <p>17 for me what the beginning steps were of your senior</p> <p>18 research project with Mr. Devick?</p> <p>19 A. When we looked at the Pierce Saccade Test, we</p> <p>20 decided it didn't really test saccadic functions and it</p> <p>21 didn't mimic the reading process and our whole -- our</p> <p>22 whole basis of research was to try to be able to</p> <p style="text-align: right;">Page 20</p>
<p>1 pages, but I can tell you which -- which pages we're</p> <p>2 going to be focusing on, but just take a look and let me</p> <p>3 know if you've seen this before?</p> <p>4 A. I do not recall seeing this before.</p> <p>5 Q. So I'll represent that this is a photocopy of a</p> <p>6 publicly available book by William K. Vincett. If you</p> <p>7 can turn, please, to the page number at the bottom that</p> <p>8 ends with four six, nine, two, three, seven?</p> <p>9 A. Yeah.</p> <p>10 Q. Take a look at the pages that are marked page 33</p> <p>11 and 34 at the bottom. That's actually the page that you</p> <p>12 were on.</p> <p>13 A. Pardon me?</p> <p>14 MR. KLUFT: And by 33 and 34, just for the</p> <p>15 record, you don't mean the bates numbers, but the</p> <p>16 records of the articles.</p> <p>17 Q. Yeah, no. The number at the center in the</p> <p>18 bottom, so the two pages that you have.</p> <p>19 A. These two?</p> <p>20 Q. Yes. Have you seen these before?</p> <p>21 A. No.</p> <p>22 Q. Okay. You can set that aside. Are you familiar</p> <p style="text-align: right;">Page 19</p>	<p>1 identify reading difficulties in children, so we decided</p> <p>2 to design something that would more accurately test</p> <p>3 reading ability in children rather than what was on the</p> <p>4 Pierce Saccade Test because it didn't predict any -- it</p> <p>5 didn't mimic the reading process at all.</p> <p>6 Q. And what's the -- what is the connection between</p> <p>7 your reading ability and the saccadic function?</p> <p>8 A. In order to be a good reader, if you're -- you</p> <p>9 have to have accurate saccades, if you don't have</p> <p>10 accurate saccades, a lot of times, just for an example,</p> <p>11 when you're taking our test, you might overshoot a</p> <p>12 number and then have to come back because you -- the</p> <p>13 saccadic fixation wasn't accurate, so it takes somebody</p> <p>14 with poor saccadic functions longer to read our pages</p> <p>15 than someone who has accurate saccadic functions.</p> <p>16 Q. So somebody who has inaccurate saccadic function</p> <p>17 would take longer to read a page than somebody who did</p> <p>18 have accurate saccadic function?</p> <p>19 A. Yes.</p> <p>20 Q. Dr. King, I'm gonna hand you what's marked as</p> <p>21 exhibit three and this has the bates number KDT zero,</p> <p>22 two, nine, eight, three, zero, four and the -- this is</p> <p style="text-align: right;">Page 21</p>

<p>1 the bates number that's on the bottom right. KDT means</p> <p>2 that it was produced by your counsel and I'll just</p> <p>3 represent to you that this was a document that your</p> <p>4 counsel produced on your behalf. So, obviously, again,</p> <p>5 this is a long document, but just please flip through it</p> <p>6 and let me know if you know what it is?</p> <p>7 A. This is our senior research project.</p> <p>8 Q. Who wrote this paper?</p> <p>9 A. Steve and I.</p> <p>10 Q. And so we'll get back to the paper, but I'll</p> <p>11 have you flip to a specific page in this document. If</p> <p>12 you can find the page that has the bates number ending</p> <p>13 with two, nine, eight, three, three, nine. This is</p> <p>14 appendix two?</p> <p>15 A. Yes.</p> <p>16 Q. So looking at the next four pages which end in</p> <p>17 four, zero through four, two, you can just take a look</p> <p>18 and let me know what this is?</p> <p>19 A. That's our actual test.</p> <p>20 Q. And when you say actual test, what test are you</p> <p>21 referring to?</p> <p>22 A. King-Devick Saccade Test.</p> <p style="text-align: right;">Page 22</p>	<p>1 Q. Okay. How long did it take to create the</p> <p>2 King-Devick test?</p> <p>3 A. I couldn't tell you.</p> <p>4 Q. When you were creating -- when you were</p> <p>5 developing this test, were there prior drafts or</p> <p>6 different versions of it?</p> <p>7 A. Yes.</p> <p>8 Q. Do you recall how many different versions there</p> <p>9 were?</p> <p>10 A. I do not recall.</p> <p>11 Q. Do you recall any of the changes that you made</p> <p>12 from the prior versions to this version that we're</p> <p>13 looking at?</p> <p>14 A. I do not.</p> <p>15 Q. Do you recall whether there was always a</p> <p>16 demonstration card as the first?</p> <p>17 A. There was always a demonstration card.</p> <p>18 Q. Do you recall whether there were -- there was</p> <p>19 always a test card one?</p> <p>20 A. There was always a test card one.</p> <p>21 Q. And do you recall if the test card one always</p> <p>22 had straight lines going across it?</p> <p style="text-align: right;">Page 24</p>
<p>1 Q. Who developed the test?</p> <p>2 A. We did. Steve and I.</p> <p>3 Q. Were there parts of the test that you created</p> <p>4 and then parts that Mr. Devick created?</p> <p>5 A. My recollection I created this document.</p> <p>6 Q. You created the appendix, these first four pages</p> <p>7 of the text?</p> <p>8 A. Yes.</p> <p>9 Q. When did you create it?</p> <p>10 A. I have no idea. When we started the project.</p> <p>11 1975.</p> <p>12 Q. Do you recall when in 1975 you started the</p> <p>13 project?</p> <p>14 A. No.</p> <p>15 Q. When you say that you created the test, do you</p> <p>16 mean that you created these particular pages or you</p> <p>17 created these hard demonstration card test one, test two</p> <p>18 and test three?</p> <p>19 A. Yeah, I created this.</p> <p>20 MR. KLUFT: I'm sorry, the witness was</p> <p>21 pointing only at one page when he said that.</p> <p>22 A. I created of all of the pages.</p> <p style="text-align: right;">Page 23</p>	<p>1 A. Yes.</p> <p>2 Q. Do you recall whether there was always a test</p> <p>3 card two?</p> <p>4 A. There was.</p> <p>5 Q. Do you recall whether there were no lines</p> <p>6 between the numbers on test card two?</p> <p>7 MR. KLUFT: Object to the form. You can</p> <p>8 answer.</p> <p>9 A. There were never lines.</p> <p>10 Q. And do you recall if there -- was there always</p> <p>11 was a test card three in the King-Devick Test?</p> <p>12 A. Yes, there was.</p> <p>13 Q. And then test card three, did the numbers --</p> <p>14 were the numbers always closer together vertically than</p> <p>15 they were on the prior cards?</p> <p>16 MR. KLUFT: Object to the form. Lacks</p> <p>17 Foundation. You can answer if you know.</p> <p>18 A. Yes.</p> <p>19 Q. So just going back to the demonstration card on</p> <p>20 the page -- that ends in three, four, zero. On this</p> <p>21 demonstration card was there always lines that went</p> <p>22 across and then diagonally with arrows?</p> <p style="text-align: right;">Page 25</p>

<p>1 A. Yes.</p> <p>2 Q. And whose idea was it to include those lines?</p> <p>3 A. I believe it was mine.</p> <p>4 Q. When you were developing this test, did you have</p> <p>5 input from anyone else?</p> <p>6 A. No.</p> <p>7 Q. Did you ever discuss with Mr. Devick how you</p> <p>8 would set up the King-Devick Test?</p> <p>9 A. Yes.</p> <p>10 Q. What did you discuss?</p> <p>11 A. I don't know how to answer that question.</p> <p>12 Q. Did you discuss how many numbers to use on each</p> <p>13 card?</p> <p>14 A. I'm sure we did. I don't recall.</p> <p>15 Q. Did you discuss whether to use the lines between</p> <p>16 numbers on the demonstration card?</p> <p>17 A. Again, I'm sure we did. I don't recall any of</p> <p>18 the conversations.</p> <p>19 Q. Do the lines on this demonstration card have</p> <p>20 some purpose for this card?</p> <p>21 MR. KLUFT: Object to the form. Could you</p> <p>22 -- I want to make sure we have the right bates number.</p> <p style="text-align: right;">Page 26</p>	<p>1 A. I have to think how to answer this correctly for</p> <p>2 you. Similar to the demonstration card, it just aids the</p> <p>3 participant to follow the line straight across. It makes</p> <p>4 it easier for them to start with because as you see, the</p> <p>5 test gets harder as you go on.</p> <p>6 Q. Why do you say the test gets harder as you go</p> <p>7 on?</p> <p>8 A. Because we lose the lines. It's easy to follow</p> <p>9 lines. So the next page there's no lines. It's harder to</p> <p>10 do.</p> <p>11 Q. And so when you say the next page, you're</p> <p>12 talking about test card two on bates number three, four</p> <p>13 two?</p> <p>14 A. Yes.</p> <p>15 Q. What's the purpose of the King-Devick Test?</p> <p>16 A. I guess you're going to have to give me -- I</p> <p>17 don't quite understand what you want me to tell you.</p> <p>18 Q. Sure. I can clarify my question. What was --</p> <p>19 what was -- what did you intend to be the purpose of the</p> <p>20 King-Devick Test when you developed it for your senior</p> <p>21 research paper?</p> <p>22 A. We wanted to be able to find it that -- we hoped</p> <p style="text-align: right;">Page 28</p>
<p>1 That's all.</p> <p>2 Q. Sure I'm on the demonstration card bates number</p> <p>3 ending in eight, three, four, zero.</p> <p>4 A. Would you repeat your question?</p> <p>5 Q. Sure. Is there a purpose for the lines that are</p> <p>6 between the numbers on the demonstration card?</p> <p>7 A. Yes.</p> <p>8 Q. What is that purpose?</p> <p>9 A. Purpose is to show a person taking the test so</p> <p>10 you give them an idea of exactly what's going to happen</p> <p>11 on the next three cards, so they follow the line and</p> <p>12 move down to the next line and follow that line, move</p> <p>13 down to the next line so that they understand that's</p> <p>14 exactly what's going to happen.</p> <p>15 Q. When you say follow the line, do you mean</p> <p>16 reading across the line?</p> <p>17 A. Yes.</p> <p>18 Q. So looking at test card one, which is on bates</p> <p>19 number eight, three, four, one, do the lines on this</p> <p>20 test one page have a function?</p> <p>21 A. Yes.</p> <p>22 Q. What is that function?</p> <p style="text-align: right;">Page 27</p>	<p>1 to develop a test that we could identify poor readers in</p> <p>2 a very simple way so that we could help those students</p> <p>3 that had poor saccadic functions. Obviously poor readers</p> <p>4 aren't always because of poor saccadic functions, but if</p> <p>5 they have poor saccadic functions, they are not going to</p> <p>6 be a good reader. So what our purpose was to test</p> <p>7 children that showed poor saccadic ability so that we</p> <p>8 could train them to become better readers.</p> <p>9 Q. How could you tell that someone who took the</p> <p>10 King-Devick Test had poor saccadic abilities?</p> <p>11 A. Don't understand the question.</p> <p>12 Q. What would be the difference between someone who</p> <p>13 did well on the King-Devick Test versus somebody who</p> <p>14 showed that they had poor saccadic abilities?</p> <p>15 Q. Most of the time, people who passed the test and</p> <p>16 within the standards that we set up afterwards had</p> <p>17 accurate saccadic functions and could finish the test in</p> <p>18 a lot better time than people who had poor saccadic</p> <p>19 function.</p> <p>20 Q. How do you grade the King-Devick Test?</p> <p>21 A. Pardon me?</p> <p>22 Q. How do you grade the King-Devick Test for a</p> <p style="text-align: right;">Page 29</p>

<p>1 subject who's taking it?</p> <p>2 A. Well, you'd have to really go to Dr. Devick on</p> <p>3 that because that was his specialty in that he set up a</p> <p>4 -- after we -- after we examined a great number of</p> <p>5 students, Dr. Devick put the numbers together and came</p> <p>6 up with a standard per age with a standard deviation and</p> <p>7 when we tested them, we did a double blind study saying</p> <p>8 that if we went back and predicted which students were</p> <p>9 poor readers based on how they did on our test and we</p> <p>10 were 95 percent accurate.</p> <p>11 Q. So I'll go back to the research and the testing</p> <p>12 that you just mentioned, but just to clarify for my last</p> <p>13 question, when you're -- when you administer the</p> <p>14 King-Devick Test, do you keep a score sheet as the</p> <p>15 person who's administering the test?</p> <p>16 A. Yes.</p> <p>17 Q. What does that score sheet look like?</p> <p>18 A. Should be in here.</p> <p>19 MR. KLUFT: Well, she's not asking you to</p> <p>20 look at the document. So if you remember.</p> <p>21 A. Yes, there was this -- we had all the numbers</p> <p>22 there and we circled the numbers they missed or lines</p> <p style="text-align: right;">Page 30</p>	<p>1 the way they're spaced?</p> <p>2 A. I did.</p> <p>3 Q. And why did you space in this way?</p> <p>4 A. Again, I'm not really sure what you're asking</p> <p>5 me. I spaced them randomly so that I could test the</p> <p>6 saccadic function rather than having equal spacing.</p> <p>7 Unequal spacing tests saccadic function.</p> <p>8 Q. So if the numbers were equally spaced on each</p> <p>9 row, that would not be able to test saccadic function?</p> <p>10 A. Not accurately.</p> <p>11 Q. Why do you say that?</p> <p>12 A. Because then you use a habituation and that's a</p> <p>13 lot easier to develop a habit of going from one space to</p> <p>14 another where if they had unequal spaces, you can't</p> <p>15 develop a habit. You have to actually make the actual</p> <p>16 saccadic movement to read the test properly.</p> <p>17 Q. So if you had evenly spaced the numbers and use</p> <p>18 that for -- to test saccadic function, it would not be</p> <p>19 an accurate --</p> <p>20 A. It would not be accurate.</p> <p>21 Q. Who decided to use the specific numbers on each</p> <p>22 row in the King-Devick Test?</p> <p style="text-align: right;">Page 32</p>
<p>1 they missed.</p> <p>2 Q. So when you say you circled the number, those</p> <p>3 are the numbers reading across on each card?</p> <p>4 A. Right.</p> <p>5 Q. And so what -- when someone misses a number or</p> <p>6 they read the wrong number --</p> <p>7 A. We circled it. So then we'd find out how many</p> <p>8 errors they did per card and how long it took them to</p> <p>9 read the card.</p> <p>10 Q. So you would time how long it takes someone to</p> <p>11 read each card separately?</p> <p>12 MR. KLUFT: Objection. You can answer.</p> <p>13 A. Yes. And then time them and how many errors they</p> <p>14 made.</p> <p>15 Q. Who decided how many numbers to put on each row</p> <p>16 in the King-Devick Test?</p> <p>17 A. I believe I did.</p> <p>18 Q. Why are there -- so I'm looking at test card one</p> <p>19 on bates number ending with eight, three, four, one. Why</p> <p>20 are there five numbers on each row going across?</p> <p>21 A. I do not recall.</p> <p>22 Q. Do you recall who decided to space the numbers</p> <p style="text-align: right;">Page 31</p>	<p>1 A. That was me.</p> <p>2 Q. Is there a particular reason why you chose these</p> <p>3 numbers?</p> <p>4 A. Random.</p> <p>5 Q. Could you have used consecutive numbers on each</p> <p>6 row? One, two, three?</p> <p>7 A. No.</p> <p>8 Q. Why not?</p> <p>9 A. Because that wouldn't test anything. That would</p> <p>10 just be rote memorization.</p> <p>11 Q. So I'm turning to a different page on exhibit</p> <p>12 three. If you can turn to the page ending in two, nine,</p> <p>13 eight, three, one, six?</p> <p>14 A. Okay.</p> <p>15 Q. I'm sorry I misread the page number. If you can</p> <p>16 please turn to the page ending in two, nine, eight,</p> <p>17 three, three, zero. Take a look at that page and let me</p> <p>18 know if you recognize this.</p> <p>19 A. I do recognize this.</p> <p>20 Q. What is it? Does the Pierce Saccade Test on this</p> <p>21 page have similar arrows to the demonstration card of</p> <p>22 the King-Devick Test?</p> <p style="text-align: right;">Page 33</p>

<p>1 A. Similar.</p> <p>2 Q. How is it similar?</p> <p>3 A. They have the arrows and lines.</p> <p>4 Q. And what are the arrows and lines for?</p> <p>5 A. Again, to show whoever is taking the test how to</p> <p>6 follow.</p> <p>7 Q. And then flipping to the next page, ending in</p> <p>8 bates number eight, three, three, one, what are the</p> <p>9 lines on this page for?</p> <p>10 MR. KLUFT: Objection. Lack of foundation,</p> <p>11 you can answer.</p> <p>12 A. The same way just to follow -- to go from one</p> <p>13 number to the next.</p> <p>14 Q. Then flipping to the next page ending with</p> <p>15 eight, three, three, two. Are there any lines on this</p> <p>16 page?</p> <p>17 A. No.</p> <p>18 Q. Do you know why not?</p> <p>19 A. No.</p> <p>20 Q. On this page would the reader read the numbers</p> <p>21 from left to right?</p> <p>22 MR. KLUFT: Objection. You can answer.</p> <p style="text-align: right;">Page 34</p>	<p>1 Q. What else is similar?</p> <p>2 A. The lines and then no lines.</p> <p>3 Q. When you say the lines, do you mean the lines on</p> <p>4 the demonstration card?</p> <p>5 A. Yes.</p> <p>6 Q. And on the test one card?</p> <p>7 A. Yes.</p> <p>8 Q. And when you say no lines, do you mean on test</p> <p>9 two and test three cards?</p> <p>10 A. Yes.</p> <p>11 Q. Is there anything else that's similar between</p> <p>12 the two tests?</p> <p>13 A. No.</p> <p>14 Q. What's different between the King-Devick Test</p> <p>15 and the Pierce Saccade Test?</p> <p>16 MR. KLUFT: Objection. You can answer.</p> <p>17 A. Because of the fact that we used more numbers,</p> <p>18 more randomly spaced numbers, it actually tested</p> <p>19 saccadic function. Whereas this did not because it just,</p> <p>20 it was just smooth pursuits and habituation. There were</p> <p>21 a lot of things wrong with this that didn't test</p> <p>22 saccadic function.</p> <p style="text-align: right;">Page 36</p>
<p>1 A. Yes.</p> <p>2 Q. Flipping to the next page ending in two, nine,</p> <p>3 eight, three, three, three. Would the reader read the</p> <p>4 numbers from left to right on this page as well?</p> <p>5 A. Yes.</p> <p>6 Q. Is the King-Devick Test a modification of the</p> <p>7 Pierce Saccade Test?</p> <p>8 A. No.</p> <p>9 Q. Why do you say that?</p> <p>10 A. Because the Pierce Saccade Test did not test</p> <p>11 saccades.</p> <p>12 MR. KLUFT: I'm sorry, I'm just gonna</p> <p>13 object to the form of the question as vague, but you</p> <p>14 already answered.</p> <p>15 Q. Does the King-Devick Test follow the same basic</p> <p>16 format as the Pierce Saccade Test?</p> <p>17 MR. KLUFT: Object to the form. You can</p> <p>18 answer.</p> <p>19 A. Basic format, possibly.</p> <p>20 Q. How does it follow the same basic format?</p> <p>21 A. Well, we have a demonstration card and we have</p> <p>22 three tests to test the candidate.</p> <p style="text-align: right;">Page 35</p>	<p>1 Q. Did you refer to the Pierce Saccade Test when</p> <p>2 you were developing the King-Devick Test?</p> <p>3 MR. KLUFT: Objection. Vague.</p> <p>4 A. I think they gave it to us. I don't remember.</p> <p>5 Q. Did you study the Pierce Saccade Test in your</p> <p>6 classes before you began developing the King-Devick</p> <p>7 Test?</p> <p>8 A. Yes.</p> <p>9 Q. So flipping back to the page demonstration card</p> <p>10 with the bates number ending in eight, three, three,</p> <p>11 zero?</p> <p>12 A. Yes.</p> <p>13 Q. Do you see on the bottom left of the page where</p> <p>14 it says Pierce Saccade Test Copyright 1972?</p> <p>15 A. I see that.</p> <p>16 Q. And you see at the bottom right of that page</p> <p>17 where it says Cook Inc, PO Box four, nine eight in</p> <p>18 Indiana, four seven, four, zero, one?</p> <p>19 A. Yes.</p> <p>20 Q. Do you see -- do you see similar references to</p> <p>21 the Pierce Saccade Test copyright and the Cook Inc</p> <p>22 address on the next three page ending in eight, three,</p> <p style="text-align: right;">Page 37</p>

<p>1 three, one, eight, three, three, two, and eight, three, 2 three, three? 3 A. Yes. 4 Q. Did you ever discuss with anyone whether you 5 would need to get permission to use the Pierce Saccade 6 Test in your research? 7 A. No. 8 Q. Why not? 9 A. I have no idea. Because it wasn't the same test. 10 Q. Did you ever try to contact Cook Inc. At this 11 address on the Pierce Saccade Test? 12 A. Nope. 13 Q. Did Mr. Devick try to contact Cook Inc., at that 14 address? 15 A. I have no idea. 16 Q. Did you ever consider getting a license to use 17 the Pierce Saccade Test in your paper? 18 MR. KLUFT: Objection. Lack of foundation. 19 A. Don't recall. 20 Q. How did you get this copy of the Pierce Saccade 21 Test? 22 A. I don't remember. I don't remember.</p> <p style="text-align: right;">Page 38</p>	<p>1 Q. Did you know Dr. Pierce personally? 2 A. No. 3 Q. Did you ever meet Dr. Pierce? 4 A. Yes. 5 Q. When did you meet him? 6 A. I met him right after I graduated, I believe. 7 One time. 8 Q. Where did you meet him? 9 A. At a meeting in Minneapolis. 10 Q. Do you recall what meeting that was? 11 A. North Central Conference. 12 Q. What's the North Central Conference? 13 A. It was just a conference -- a regional 14 conference with several states education. 15 Q. And how did you meet him at that conference? 16 A. Just by chance meeting. 17 Q. What did -- what did the two of discuss? 18 A. Nothing. He asked me if I was the King from the 19 King-Devick. I said yes. 20 Q. Did you talk about the King-Devick Test with Mr. 21 Pierce? 22 A. The only thing he said to me was, I wish I had</p> <p style="text-align: right;">Page 40</p>
<p>1 Q. Did you have this copy of -- or a copy of the 2 Pierce Saccade Test when you were developing the 3 King-Devick Test? 4 A. Yes. 5 Q. Did you refer to that copy of the Pierce Saccade 6 Test while you were developing the King-Devick Test? 7 MR. KLUFT: Objection. Asked and answered. 8 You can answer. 9 A. Not really. We developed our own. 10 Q. You had mentioned earlier that there were 11 different drafts or versions of the King-Devick Test 12 while you were working on the senior research. Is that 13 right? 14 A. Yes. 15 Q. Were there any drafts that had fewer than five 16 numbers on a row? 17 A. I do not remember. 18 Q. Do you know who created the Pierce Saccade Test? 19 A. Dr. Jack Pierce. 20 Q. Who's Dr. Jack Pierce? 21 A. He's a professor of optometry that taught at 22 some of the schools. I'm not even sure where he was.</p> <p style="text-align: right;">Page 39</p>	<p>1 thought of that. And that was the end of the 2 conversation. 3 Q. Did you respond when he said he wished he had 4 thought of that? 5 A. No. 6 Q. Did you know Mr. Pierce before you developed the 7 King-Devick Test? 8 A. No. 9 Q. Do you know Mr. Pierce came to know about the 10 King-Devick Test? 11 A. I do not. 12 Q. Did you ask him? 13 A. No. 14 Q. So if you can please turn to page in the same 15 exhibit ending in bates number two, nine, eight, three 16 zero, six? So the very beginning? 17 A. Yes. 18 Q. See in the second full paragraph where it says 19 with this in mind, we designed a test which was a 20 modification of the Pierce and Vincett test, which we 21 administered to 137 school aged children in the Chicago 22 area. Do you see where it says that?</p> <p style="text-align: right;">Page 41</p>

<p>1 Q. Did you test any other tests other than the</p> <p>2 King-Devick Test?</p> <p>3 A. I believe we also tested them with the Pierce</p> <p>4 Saccade Test.</p> <p>5 Q. Did you do that on the same day or, you know,</p> <p>6 around the same time you tested them with the</p> <p>7 King-Devick Test?</p> <p>8 A. Around the same time.</p> <p>9 Q. Why did you do that?</p> <p>10 A. We wanted to compare to see if we were more</p> <p>11 accurate at predicting poor readers than the Pierce</p> <p>12 Saccade Test was.</p> <p>13 Q. Was it more accurate?</p> <p>14 A. Definitely.</p> <p>15 Q. Why do you say definitely?</p> <p>16 A. Because I -- as I told you earlier, we did a</p> <p>17 double blind study and we went back and predicted who</p> <p>18 were poor readers using both tests and the Pierce</p> <p>19 Saccade Test didn't come close to being as accurate as</p> <p>20 we were.</p> <p>21 Q. How did you know that one of the students was a</p> <p>22 poor reader? Was it something that was self-reported?</p> <p style="text-align: right;">Page 46</p>	<p>1 A. Yes.</p> <p>2 Q. How were the cards shown to the children at the</p> <p>3 school, the King-Devick test cards?</p> <p>4 A. What do you mean?</p> <p>5 Q. Did you show them one by one or did you show</p> <p>6 them the demonstration card first you mentioned? Did you</p> <p>7 have them do the demonstration card first and then grade</p> <p>8 that and then move onto the next card?</p> <p>9 MR. KLUFT: Objection. Asked and answered.</p> <p>10 You can answer if you understand the question.</p> <p>11 A. I think what you're asking is we always showed</p> <p>12 them the demonstration card first and then card -- then</p> <p>13 the next three cards in order with everybody.</p> <p>14 Q. And when you're showing them the cards, are you</p> <p>15 holding up the card or is it placed on the table?</p> <p>16 A. They're holding it.</p> <p>17 Q. The children -- the child is holding the card?</p> <p>18 A. Mm-hmm.</p> <p>19 Q. What size were the cards that were shown to the</p> <p>20 children?</p> <p>21 A. Same size as what's in here.</p> <p>22 Q. So is the King-Devick Test that was shown in</p> <p style="text-align: right;">Page 48</p>
<p>1 A. I don't -- no, it was reported by the school</p> <p>2 when we went back and like I said, it was a double blind</p> <p>3 study. So we went back and we said this child is a poor</p> <p>4 reader and then they -- the school told us whether or</p> <p>5 not we were correct.</p> <p>6 Q. What does it mean when a study is a double blind</p> <p>7 study?</p> <p>8 A. Well, we don't know the outcome or we don't know</p> <p>9 anything about the subjects until we come up with our</p> <p>10 diagnosis and then we'd go back to see if we were</p> <p>11 correct. We have no prior knowledge whether they're a</p> <p>12 poor reader or not.</p> <p>13 Q. Is it customary to test two tests together for a</p> <p>14 research project like this?</p> <p>15 MR. KLUFT: Objection. You can answer.</p> <p>16 A. I would imagine.</p> <p>17 Q. Why do you say that?</p> <p>18 A. Well, you want to test the accuracy of the two</p> <p>19 tests.</p> <p>20 Q. When you say you want to look at the accuracy of</p> <p>21 the two tests, do you mean that you would compare the</p> <p>22 results from the two tests?</p> <p style="text-align: right;">Page 47</p>	<p>1 that senior paper we looked at, are those the cards that</p> <p>2 you actually showed the children in that school?</p> <p>3 A. Yes.</p> <p>4 Q. And you had mentioned that there were several</p> <p>5 people that were helping you test this and that you may</p> <p>6 have made copies to have them help you; is that right?</p> <p>7 A. Correct.</p> <p>8 Q. Do you recall roughly how many copies you had to</p> <p>9 make?</p> <p>10 A. I don't.</p> <p>11 Q. Do you recall whether you gave these -- these</p> <p>12 other students the copies or if you asked for them back?</p> <p>13 A. No, we took them back.</p> <p>14 Q. When did you take the back?</p> <p>15 A. Right after we did the test -- after we finished</p> <p>16 this -- the testing on the students, Steve and I</p> <p>17 collected the tests and kept them for ourselves.</p> <p>18 Q. How did you -- so when you tested the students</p> <p>19 with the Pierce Saccade Test was that also on paper?</p> <p>20 A. Yes.</p> <p>21 Q. And was that using the version of the Pierce</p> <p>22 Saccade Test we saw on your senior paper?</p> <p style="text-align: right;">Page 49</p>

<p>1 A. Yes.</p> <p>2 Q. Did you also make copies of the Pierce Saccade</p> <p>3 Test to have these other students help you test at the</p> <p>4 school?</p> <p>5 A. Yes.</p> <p>6 Q. Did you ask for those copies back after they</p> <p>7 were finished testing?</p> <p>8 A. Yes.</p> <p>9 Q. Did you provide the other students that helped</p> <p>10 you with the testing with instructions?</p> <p>11 A. Yes.</p> <p>12 Q. Were they written instructions or oral</p> <p>13 instructions?</p> <p>14 A. Both.</p> <p>15 Q. Do you still have the written instructions?</p> <p>16 A. No.</p> <p>17 Q. Do you recall who wrote the instructions?</p> <p>18 A. No.</p> <p>19 Q. Would it have been either you or Mr. Devick?</p> <p>20 A. It would've been one of us, yes.</p> <p>21 Q. Did you make any changes to the King-Devick Test</p> <p>22 while you were testing the students at the school?</p> <p style="text-align: right;">Page 50</p>	<p>1 A. No.</p> <p>2 Q. Did you have a faculty advisor that helped with</p> <p>3 the paper?</p> <p>4 A. We had a faculty advisor. He did not help with</p> <p>5 the paper.</p> <p>6 Q. Who is the faculty advisor?</p> <p>7 A. Dr. Darrell Slangy.</p> <p>8 Q. What was his role as the faculty advisor?</p> <p>9 A. That's a good question. I'm not real sure.</p> <p>10 Q. Did he review the paper before you submitted it?</p> <p>11 A. No.</p> <p>12 Q. Did you show him the King-Devick Test before you</p> <p>13 wrote the paper?</p> <p>14 A. I believe we did, not sure. I don't remember.</p> <p>15 Q. If you did show him the King-Devick Test, do you</p> <p>16 have an idea of why you would have shown it to him?</p> <p>17 MR. KLUFT: Objection. You can answer if</p> <p>18 you know.</p> <p>19 A. I'm not sure. I don't remember if we needed the</p> <p>20 permission to do the research project. I just don't</p> <p>21 remember. It's too long ago.</p> <p>22 Q. Generally, when you do research as a student at</p> <p style="text-align: right;">Page 52</p>
<p>1 A. No.</p> <p>2 Q. Did you make any changes to the instructions</p> <p>3 while you were testing the students at the school?</p> <p>4 A. No.</p> <p>5 Q. Did you make any changes to the King-Devick Test</p> <p>6 after you had finished the testing of the students at</p> <p>7 the school?</p> <p>8 A. No.</p> <p>9 Q. So we've been going for about an hour. Would you</p> <p>10 like to take a break?</p> <p>11 A. I could use a restroom break.</p> <p>12 Q. Okay.</p> <p>13 VIDEOGRAPHER: We are now going off the</p> <p>14 record at 2:44 p.m.</p> <p>15 (Recess taken.)</p> <p>16 VIDEOGRAPHER: We are going back on the</p> <p>17 record at 2:54 p.m.</p> <p>18 Q. Dr. King, who was involved in the writing</p> <p>19 process for that senior paper?</p> <p>20 A. Steve Devick and me.</p> <p>21 Q. Was there anybody else that helped edit the</p> <p>22 paper?</p> <p style="text-align: right;">Page 51</p>	<p>1 the Illinois College of Optometry, do you know whether</p> <p>2 you would need to get permission to do research?</p> <p>3 MR. KLUFT: Objection. Vague and lacks</p> <p>4 foundation. You can answer if you understand.</p> <p>5 A. No idea.</p> <p>6 Q. Did you write multiple drafts of the senior</p> <p>7 paper before this final version that was exhibit three?</p> <p>8 A. Don't believe so.</p> <p>9 Q. So exhibit three is the only draft that you</p> <p>10 worked on?</p> <p>11 A. Yes.</p> <p>12 Q. Did you and Mr. Devick edit the draft before you</p> <p>13 printed it?</p> <p>14 A. No recollection.</p> <p>15 Q. When -- when did you submit the final paper?</p> <p>16 A. March of 1976.</p> <p>17 Q. Who did you submit the paper to?</p> <p>18 A. Dr. Darrell Slangy.</p> <p>19 Q. Did you submit to him the original copy?</p> <p>20 A. Yes.</p> <p>21 Q. And is that the original copy that you produced</p> <p>22 to your counsel?</p> <p style="text-align: right;">Page 53</p>

<p>1 A. Yes. This one.</p> <p>2 Q. When you say this one, do you mean it was the</p> <p>3 same as exhibit three or was it the actual physical copy</p> <p>4 that you provided to your counsel?</p> <p>5 A. I provided him the exact physical copy.</p> <p>6 Q. And that was the same copy that you gave to your</p> <p>7 faculty advisor?</p> <p>8 A. Yes.</p> <p>9 Q. Was that the only copy you had to submit?</p> <p>10 MR. KLUFT: Objection. You can answer.</p> <p>11 A. That was the only copy I had. I think Steve had</p> <p>12 one.</p> <p>13 Q. Do you know whether Mr. Devick had to submit his</p> <p>14 copy as well?</p> <p>15 A. We submitted one copy.</p> <p>16 Q. Did you make any copies of the final senior</p> <p>17 paper?</p> <p>18 A. I don't understand your question. They're right</p> <p>19 there.</p> <p>20 Q. So before you submitted your one original copy</p> <p>21 of the senior paper, did you make any photocopies to</p> <p>22 keep for yourself?</p> <p style="text-align: right;">Page 54</p>	<p>1 A. Yes.</p> <p>2 Q. What grade did you receive for the senior paper?</p> <p>3 A. A B.</p> <p>4 Q. Why do you think that is?</p> <p>5 MR. KLUFT: Objection.</p> <p>6 A. You don't even want to get me started on that</p> <p>7 one. I do not know why he gave us a B.</p> <p>8 Q. Did you ask your advisor why he gave you that</p> <p>9 grade?</p> <p>10 A. I did.</p> <p>11 Q. And what did he say?</p> <p>12 A. I don't remember. We didn't have a very pleasant</p> <p>13 conversation.</p> <p>14 Q. Why do you say it wasn't very pleasant?</p> <p>15 A. Because we deserved an A.</p> <p>16 Q. Did you tell him that you deserved an A?</p> <p>17 A. Yes.</p> <p>18 Q. What was his response to that?</p> <p>19 A. I don't remember.</p> <p>20 Q. Did he give you your grade in person?</p> <p>21 A. I don't remember.</p> <p>22 Q. Did he give you any critiques on the senior</p> <p style="text-align: right;">Page 56</p>
<p>1 MR. KLUFT: Objection.</p> <p>2 A. No.</p> <p>3 Q. Do you know whether Mr. Devick made any</p> <p>4 photocopies for himself?</p> <p>5 A. No idea.</p> <p>6 Q. When did your faculty advisor give you that</p> <p>7 original copy back?</p> <p>8 A. I don't remember.</p> <p>9 Q. Was it --</p> <p>10 A. Before I graduated.</p> <p>11 Q. So that was before 1976.</p> <p>12 MR. KLUFT: Objection.</p> <p>13 A. Before? I don't remember when he gave it back to</p> <p>14 us.</p> <p>15 MR. KLUFT: I think the witness testified</p> <p>16 that he handed it in in 1976. So it couldn't possibly be</p> <p>17 before 1976.</p> <p>18 Q. Right. But -- so when did you graduate from the</p> <p>19 Illinois College of Optometry?</p> <p>20 A. June of 1976 -- or May of 1976, I believe.</p> <p>21 Q. So your faculty advisor gave you back that</p> <p>22 original senior paper between March and May of 1976?</p> <p style="text-align: right;">Page 55</p>	<p>1 paper?</p> <p>2 A. No.</p> <p>3 Q. Do you know whether your faculty advisor made</p> <p>4 any copies of the senior paper?</p> <p>5 A. I don't know.</p> <p>6 Q. When you submitted the senior paper, did you</p> <p>7 expect him to show it to anyone else?</p> <p>8 MR. KLUFT: Objection. You can answer.</p> <p>9 A. No.</p> <p>10 Q. Did you expect him to show it to any other</p> <p>11 students at the school?</p> <p>12 A. No.</p> <p>13 Q. Do you know whether he did show the senior paper</p> <p>14 to any other students?</p> <p>15 A. I have no idea.</p> <p>16 Q. Do you know whether he showed any copies of the</p> <p>17 King-Devick Test to anyone else at the school?</p> <p>18 A. I have no idea.</p> <p>19 Q. Do you recall whether any of the faculty at the</p> <p>20 Illinois College of Optometry taught their students</p> <p>21 about the King-Devick Test around the time you</p> <p>22 graduated?</p> <p style="text-align: right;">Page 57</p>

<p>1 A. I have no idea.</p> <p>2 Q. When you submitted your senior paper, did you</p> <p>3 expect that your senior advisor would give it back to</p> <p>4 you?</p> <p>5 A. Yes.</p> <p>6 Q. And he did give it back to you?</p> <p>7 A. Yes.</p> <p>8 Q. Did you expect that the college's library would</p> <p>9 receive a copy?</p> <p>10 A. No.</p> <p>11 Q. Do you know whether the library did receive a</p> <p>12 copy?</p> <p>13 A. I believe they did. I'm not sure.</p> <p>14 Q. Do you know who provided that copy to the</p> <p>15 library?</p> <p>16 MR. KLUFT: Objection.</p> <p>17 A. No. I don't.</p> <p>18 Q. Do you know whether the library made any copies</p> <p>19 of the senior paper that it had?</p> <p>20 A. I do not know.</p> <p>21 Q. Do you know who had access to the copies to the</p> <p>22 senior paper at the Illinois College of Optometry</p> <p style="text-align: right;">Page 58</p>	<p>1 paper, did you look at any other -- any prior senior</p> <p>2 papers from other students?</p> <p>3 A. No.</p> <p>4 Q. After you submitted your senior paper, did you</p> <p>5 have to present your research in class?</p> <p>6 A. I don't recall.</p> <p>7 Q. Do you recall whether there was any other work</p> <p>8 product other than the paper itself that came out of</p> <p>9 your research?</p> <p>10 A. I don't understand your question.</p> <p>11 Q. Were there any other physical materials, any</p> <p>12 other presentations that you created based on your</p> <p>13 senior research?</p> <p>14 A. No.</p> <p>15 Q. Did you give any presentations about the</p> <p>16 King-Devick test to anyone, whether they were at the</p> <p>17 college or not?</p> <p>18 MR. KLUFT: Objection. Vague as to time</p> <p>19 period.</p> <p>20 A. Exactly. I don't know when.</p> <p>21 Q. Did you give any presentations about the</p> <p>22 King-Devick Test to anyone in the 1970s?</p> <p style="text-align: right;">Page 60</p>
<p>1 library?</p> <p>2 MR. KLUFT: Objection. There's almost no</p> <p>3 foundation for any of these questions. So my continuing</p> <p>4 objection, but you can answer if you know.</p> <p>5 A. No.</p> <p>6 Q. Do you know how other researchers who were</p> <p>7 interested in vision tests would be able to get a copy</p> <p>8 of the senior paper?</p> <p>9 MR. KLUFT: Objection.</p> <p>10 A. I do not know how.</p> <p>11 Q. Do you know whether any researchers learned</p> <p>12 about the King-Devick Test in the 1970s?</p> <p>13 MR. KLUFT: Objection. Vague. You can</p> <p>14 answer.</p> <p>15 A. Nope.</p> <p>16 Q. Are you aware of any research articles published</p> <p>17 in the 1970s that referenced the King-Devick Test?</p> <p>18 A. I do not.</p> <p>19 Q. Do you know whether the Illinois College of</p> <p>20 Optometry's library kept copies of senior papers?</p> <p>21 A. I don't know for sure.</p> <p>22 Q. When you were doing research for this senior</p> <p style="text-align: right;">Page 59</p>	<p>1 A. No. Not that I remember.</p> <p>2 Q. When did you start your optometry practice?</p> <p>3 A. 1976.</p> <p>4 Q. Did you use the test as part of your optometry</p> <p>5 practice?</p> <p>6 A. Yes.</p> <p>7 Q. Do you recall when you started using the</p> <p>8 King-Devick Test?</p> <p>9 A. Right away.</p> <p>10 Q. Do you recall around what month that would have</p> <p>11 been?</p> <p>12 A. June.</p> <p>13 Q. June of 1976? How did you use the King-Devick</p> <p>14 Test in your optometry practice?</p> <p>15 A. I made copies of the cards and I used them to</p> <p>16 test students who I thought might be poor readers --</p> <p>17 patients that I thought might be poor readers.</p> <p>18 Q. Do you recall how many copies you made of the</p> <p>19 test when you first started your optometry practice?</p> <p>20 MR. KLUFT: Objection. Vague as to time</p> <p>21 period, but go ahead.</p> <p>22 A. One.</p> <p style="text-align: right;">Page 61</p>

<p>1 Q. When you tested your patients with the</p> <p>2 King-Devick Test, did you test any other vision tests?</p> <p>3 A. No.</p> <p>4 Q. Did you give out any copies of the King-Devick</p> <p>5 test to any of your patients?</p> <p>6 MR. KLUFT: Objection. Vague as to time</p> <p>7 period.</p> <p>8 A. Not really.</p> <p>9 Q. Why do you say not really?</p> <p>10 A. I used a couple maybe over -- before Bernell, I</p> <p>11 think I might've made a copy to give to a student, maybe</p> <p>12 two or three times.</p> <p>13 Q. Do you recall whether that was before 1980?</p> <p>14 A. It would have definitely been before 1980.</p> <p>15 Q. And who was the student that you made copies</p> <p>16 for.</p> <p>17 A. I have no idea.</p> <p>18 Q. Was this a student at the Illinois College of</p> <p>19 Optometry?</p> <p>20 A. No. These were patients when I was in practice.</p> <p>21 Q. So you -- you made a copy of the King-Devick</p> <p>22 Test for a patient at your practice?</p> <p style="text-align: right;">Page 62</p>	<p>1 Q. Before 1980, did you work with any other</p> <p>2 optometrists in your optometry practice?</p> <p>3 A. No.</p> <p>4 Q. You were a solo practitioner?</p> <p>5 A. Correct.</p> <p>6 Q. Did you ever work with Mr. Devick in an</p> <p>7 optometry practice?</p> <p>8 A. No.</p> <p>9 Q. Before 1980 was your optometry practice based in</p> <p>10 Dickinson, North Dakota?</p> <p>11 A. No, I was in Langdon, North Dakota.</p> <p>12 Q. And where is Langdon, North Dakota?</p> <p>13 A. Northeast corner of the state.</p> <p>14 Q. When you gave that copy of the King-Devick Test</p> <p>15 to one of your patients, did you ask for it back?</p> <p>16 A. I believe I did.</p> <p>17 Q. Do you recall whether this patient gave you the</p> <p>18 test back?</p> <p>19 A. I believe they did.</p> <p>20 Q. Do you recall around when you asked for the test</p> <p>21 back?</p> <p>22 A. No.</p> <p style="text-align: right;">Page 64</p>
<p>1 A. Yes.</p> <p>2 Q. Do you recall -- do you recall why?</p> <p>3 A. I used that as remediation for a couple of my</p> <p>4 patients.</p> <p>5 Q. What do you mean by remediation?</p> <p>6 A. I had them use the test over and over again and</p> <p>7 I felt that by using the test over and over again, it</p> <p>8 would improve their saccadic functions.</p> <p>9 Q. Did it improve their function?</p> <p>10 A. Yep.</p> <p>11 MR. KLUFT: I'm sorry. I just -- I just</p> <p>12 would impose an objection. I just want to caution that</p> <p>13 we don't want to get too far into medical histories of</p> <p>14 individual -- individual patients. And if we do, I want</p> <p>15 to take a break and think about the question. So if</p> <p>16 you're going to stop it there, that's fine. But if we're</p> <p>17 going to get deep into somebody's medical history, I</p> <p>18 want to think about it and maybe have a discussion off</p> <p>19 the record.</p> <p>20 Q. Sure. Did you give any copies of the King-Devick</p> <p>21 Test to any parents of your patients?</p> <p>22 A. No.</p> <p style="text-align: right;">Page 63</p>	<p>1 Q. Do you know whether the patient made any copies</p> <p>2 of the King-Devick Test?</p> <p>3 A. No.</p> <p>4 Q. You don't recall?</p> <p>5 A. I don't know.</p> <p>6 Q. Do you -- do you know whether he showed anyone</p> <p>7 his copy or her copy of the King-Devick Test?</p> <p>8 A. I have no idea.</p> <p>9 Q. Are you aware of any colleges or universities</p> <p>10 that taught the King-Devick Test prior to 1980?</p> <p>11 MR. KLUFT: Objection. Vague. You can</p> <p>12 answer.</p> <p>13 A. I have no idea.</p> <p>14 Q. Just going back to the patient who received a</p> <p>15 copy of the King-Devick Test before 1980, do you recall</p> <p>16 this person's name?</p> <p>17 MR. KLUFT: Objection. You can answer. I'm</p> <p>18 sorry. I withdraw the objection. I just -- instead, I</p> <p>19 just want to caution, again, I don't want to get into</p> <p>20 medical history. If we are going to get into it, I'd</p> <p>21 like to maybe designate a portion of the transcript as</p> <p>22 highly confidential and --</p> <p style="text-align: right;">Page 65</p>

<p>1 MR. MCCALLION: That's fine. Don't think</p> <p>2 we're really going to go much farther, but okay.</p> <p>3 MR. KLUFT: I don't want to be an</p> <p>4 obstructionist. I also just -- I don't want to create a</p> <p>5 transcript with somebody's medical information on it</p> <p>6 because that'll create all kinds of problems.</p> <p>7 Q. Okay.</p> <p>8 A. Well, this is over 40 years ago. I couldn't name</p> <p>9 one patient I had in 1976.</p> <p>10 Q. Okay. Do you know whether your faculty advisor,</p> <p>11 Professor Slangy taught any other students about the</p> <p>12 King-Devick Test?</p> <p>13 A. I have no idea.</p> <p>14 Q. Do you recall that when we spoke on the phone on</p> <p>15 August 30th, you had mentioned that Professor Slangy had</p> <p>16 started teaching the test to his students at the</p> <p>17 Illinois College of Optometry after you submitted the</p> <p>18 paper?</p> <p>19 A. I'd heard that. I don't know that firsthand.</p> <p>20 Q. Who did you hear that from?</p> <p>21 A. I don't remember.</p> <p>22 Q. Do you recall whether it was a fellow classmate?</p> <p style="text-align: right;">Page 66</p>	<p>1 student?</p> <p>2 MR. KLUFT: Objection. Vague as to --</p> <p>3 A. Yeah, what did I discuss. I don't know.</p> <p>4 Q. Did you discuss the use of the test with the</p> <p>5 student when you found out that or when you heard that</p> <p>6 he or she had learned about the King-Devick Test in</p> <p>7 class?</p> <p>8 A. I don't think so.</p> <p>9 Q. Do you recall anything else from your</p> <p>10 conversation with this person?</p> <p>11 A. I don't.</p> <p>12 Q. Was there ever a time when you gave the Illinois</p> <p>13 College of Optometry any restrictions on how they could</p> <p>14 use this senior paper?</p> <p>15 MR. KLUFT: Objection. Foundation. You can</p> <p>16 answer.</p> <p>17 A. Will you repeat the question, please?</p> <p>18 Q. Sure Was there ever a time when you gave the</p> <p>19 Illinois College of Optometry any restrictions on how</p> <p>20 the college could use the senior paper?</p> <p>21 A. Not directly, I didn't. When I heard that they</p> <p>22 were using it, I called Steve and Steve talked to them.</p> <p style="text-align: right;">Page 68</p>
<p>1 A. I don't think so. I think it was a student that</p> <p>2 was behind me, graduated after me.</p> <p>3 Q. Do you recall when you spoke to this student who</p> <p>4 graduated after you?</p> <p>5 A. No.</p> <p>6 Q. Do you recall whether it was more than three</p> <p>7 years after you graduated?</p> <p>8 A. I believe it was less.</p> <p>9 Q. How did you find out that this student learned</p> <p>10 about the King-Devick Test?</p> <p>11 A. You know, I don't remember.</p> <p>12 Q. Was this person a friend of yours from school?</p> <p>13 A. Yes, I think.</p> <p>14 Q. Do you recall whether this student had received</p> <p>15 a copy of the King-Devick Test?</p> <p>16 A. I don't believe so.</p> <p>17 Q. Do you recall what class the test was taught in?</p> <p>18 A. No.</p> <p>19 Q. Do you recall whether the student knew about the</p> <p>20 senior paper or just the King-Devick Test?</p> <p>21 A. I'm not sure either. Again, I'm not sure.</p> <p>22 Q. Did you discuss the King-Devick Test with the</p> <p style="text-align: right;">Page 67</p>	<p>1 Q. Around when was that?</p> <p>2 A. Probably right after we graduated. Shortly after</p> <p>3 we graduated.</p> <p>4 Q. And when you say that you had heard the college</p> <p>5 was using the paper, was that -- or the King-Devick</p> <p>6 Test, was that from that same student we just discussed?</p> <p>7 A. Yes.</p> <p>8 Q. Do you know what Mr. Devick did after you told</p> <p>9 him?</p> <p>10 A. I really don't know. He said he took care of it.</p> <p>11 Q. Other than to the one patient we have already</p> <p>12 discussed. Did you give out any copies of the</p> <p>13 King-Devick Test to any other researchers or</p> <p>14 optometrists?</p> <p>15 A. No.</p> <p>16 Q. Have you heard of the King-Devick Test being</p> <p>17 referred to as the NYSOA K-D Test?</p> <p>18 A. Yes.</p> <p>19 Q. Do you know what the NYSOA is?</p> <p>20 A. No.</p> <p>21 Q. What is the NYSOA K-D Test?</p> <p>22 A. It's what we had when -- we were under contract</p> <p style="text-align: right;">Page 69</p>

<p>1 with Bernell. They named it that, and I'm not sure why.</p> <p>2 Q. What is Bernell?</p> <p>3 A. Bernell is a corporation that manufactured the</p> <p>4 King-Devick Test and marketed it for us.</p> <p>5 Q. Do you recall when Bernell started marketing and</p> <p>6 manufacturing the King-Devick Test?</p> <p>7 A. It was in the early eighties. I'm not exactly</p> <p>8 positive when exactly it was.</p> <p>9 Q. Dr. King, I'm handing you what's marked as</p> <p>10 exhibit four, and this is a document that I'll represent</p> <p>11 your counsel produced on your behalf, bearing bates</p> <p>12 number KDT0298388. Take a look at the document and let me</p> <p>13 know if you know what it is?</p> <p>14 A. I do know what this is.</p> <p>15 Q. What is it?</p> <p>16 A. It's the King-Devick Test that Bernell</p> <p>17 manufactured and marketed for us.</p> <p>18 Q. Just looking through this document, is this the</p> <p>19 same King-Devick Test as the King-Devick Test shown in</p> <p>20 your senior paper?</p> <p>21 A. Yes.</p> <p>22 Q. And looking specifically at the page ending in</p> <p style="text-align: right;">Page 70</p>	<p>1 haven't looked at this in 42 years.</p> <p>2 Q. Flipping to the page ending in bates number two</p> <p>3 nine, eight, three, nine, four. What is shown on this</p> <p>4 page?</p> <p>5 A. That's our score sheet.</p> <p>6 Q. Do you recall who wrote this score sheet?</p> <p>7 A. We did.</p> <p>8 Q. And when you say we, you mean --</p> <p>9 A. Steve and I.</p> <p>10 Q. Do you recall when you wrote the score sheet?</p> <p>11 A. It's part of our research project. The end</p> <p>12 result of our research project.</p> <p>13 Q. And so you would have created this around 1975</p> <p>14 or 76?</p> <p>15 A. Yes.</p> <p>16 Q. Do you recall whether you used the score sheet</p> <p>17 when you tested the students at the Chicago Public</p> <p>18 School?</p> <p>19 A. We did not. This is a result of what we tested</p> <p>20 with the students.</p> <p>21 Q. So you created this test after you completed the</p> <p>22 testing of those students?</p> <p style="text-align: right;">Page 72</p>
<p>1 bates number two, nine, eight, three, eight, nine where</p> <p>2 it says instructions. You see that?</p> <p>3 A. Yes.</p> <p>4 Q. Who wrote these instructions?</p> <p>5 A. I don't recall. Either Steve or me.</p> <p>6 Q. Do you recall when these instructions would have</p> <p>7 been written?</p> <p>8 A. We wrote these instructions when we wrote the</p> <p>9 test.</p> <p>10 Q. So these instructions would have been written</p> <p>11 around 1975 or 1976?</p> <p>12 A. Yes.</p> <p>13 Q. Do you recall whether these were the</p> <p>14 instructions that you had provided to the other students</p> <p>15 that helped you test the King-Devick Test in that</p> <p>16 Chicago Public School?</p> <p>17 A. I don't recall.</p> <p>18 Q. Are these instructions part of your senior</p> <p>19 paper?</p> <p>20 MR. KLUFT: Objection. Vague. But you can</p> <p>21 answer if you know.</p> <p>22 A. I'm not sure if we have it in here or not. I</p> <p style="text-align: right;">Page 71</p>	<p>1 MR. KLUFT: Object to the form. Vague. You</p> <p>2 can answer.</p> <p>3 A. This isn't a test. This is a score sheet and we</p> <p>4 established norms and standard deviations as you can see</p> <p>5 by the age. So if they take this test, we can find out</p> <p>6 where they are as far as what age they are at and how</p> <p>7 many seconds it takes to do the tests and how many</p> <p>8 mistakes they made and it gives them a pass or fail on</p> <p>9 this.</p> <p>10 Q. When would you use this score sheet?</p> <p>11 A. Every time you take the test.</p> <p>12 Q. Did you use this score sheet when you used the</p> <p>13 KD Test in your optometry practice in the 1970s?</p> <p>14 A. I still do.</p> <p>15 Q. You still use the King-Devick Test as part of</p> <p>16 your optometry practice?</p> <p>17 A. I do.</p> <p>18 Q. Do you still use this score sheet that's shown</p> <p>19 on two, nine, eight, three, nine, four?</p> <p>20 A. I do.</p> <p>21 Q. How do you use it?</p> <p>22 A. I don't understand your question.</p> <p style="text-align: right;">Page 73</p>

<p>1 Q. Do you use it to diagnose poor reading?</p> <p>2 A. Yes.</p> <p>3 Q. When you gave your patient a copy of the</p> <p>4 King-Devick Test sometime prior to 1980, did you also</p> <p>5 give your patient a copy of the score sheet?</p> <p>6 A. No.</p> <p>7 Q. You can put this document aside. How did</p> <p>8 Bernell come to market and manufacturer the King-Devick</p> <p>9 Test?</p> <p>10 A. You'd have to ask Dr. Devick because I wasn't</p> <p>11 involved in that.</p> <p>12 Q. Do you recall whether there was a contract?</p> <p>13 A. Yes.</p> <p>14 Q. Do you recall whether you signed that contract?</p> <p>15 A. I did sign the contract.</p> <p>16 Q. Do you recall what the terms where for that</p> <p>17 contract?</p> <p>18 A. What do you mean by what terms?</p> <p>19 Q. Do you recall what Bernell had agreed to do for</p> <p>20 the King-Devick Test?</p> <p>21 A. Vaguely.</p> <p>22 Q. What is your recollection?</p> <p style="text-align: right;">Page 74</p>	<p>1 Q. Do you recall when you first started getting</p> <p>2 those checks from Bernell?</p> <p>3 A. About a year after we signed the contract.</p> <p>4 Q. And do you still receive royalties from Bernell?</p> <p>5 A. No.</p> <p>6 Q. Do you recall around when you stopped receiving</p> <p>7 royalties from Bernell?</p> <p>8 A. When we ended our relationship with them.</p> <p>9 Q. Do you recall the approximate year?</p> <p>10 A. I don't.</p> <p>11 Q. Do you recall how the contract ended?</p> <p>12 A. I do not.</p> <p>13 Q. Were you involved still with the business when</p> <p>14 the contract ended?</p> <p>15 MR. KLUFT: Objection. Lack of foundation.</p> <p>16 But you can answer.</p> <p>17 A. No.</p> <p>18 Q. Dr. King, handing you what's marked as exhibit</p> <p>19 five. And this is a document bearing bates number KDT</p> <p>20 three, zero, four, eight, one, eight. Please take a look</p> <p>21 and let me know if you know what this is? And looking at</p> <p>22 the page with the bates number ending three, zero, four,</p> <p style="text-align: right;">Page 76</p>
<p>1 A. We were -- we got royalties for the number of</p> <p>2 tests that they sold. We got the royalty. I believe</p> <p>3 five dollars per unit, I believe.</p> <p>4 Q. Do you recall how long the term was for that</p> <p>5 Contract? How many years?</p> <p>6 A. I don't remember how long we did it. I don't.</p> <p>7 Q. Do you recall whether it was less than five</p> <p>8 years or more?</p> <p>9 MR. KLUFT: Object. Asked and answered.</p> <p>10 You can answer.</p> <p>11 A. I don't remember. It might've been -- I don't</p> <p>12 really remember.</p> <p>13 Q. So you mentioned that you received royalties for</p> <p>14 sales of the King-Devick Test; is that right?</p> <p>15 A. Sort of.</p> <p>16 Q. Why do you say sort of?</p> <p>17 A. Well, we didn't get much money.</p> <p>18 Q. When you received the royalties, who did the</p> <p>19 money come from?</p> <p>20 A. From Bernell.</p> <p>21 Q. Would you receive a check from Bernell?</p> <p>22 A. Yes.</p> <p style="text-align: right;">Page 75</p>	<p>1 eight, two, zero. Is that your signature on the bottom</p> <p>2 right?</p> <p>3 A. Yes.</p> <p>4 Q. Do you recall whether there were any amendments</p> <p>5 to this contract?</p> <p>6 A. I do not recall.</p> <p>7 Q. Do you recall whether there was a renewal of</p> <p>8 this contract?</p> <p>9 A. I do not recall.</p> <p>10 Q. You can set this document aside. I'm handing you</p> <p>11 a document marked as exhibit six and this is a document</p> <p>12 bearing bates numbers KDT zero, zero three, two, three,</p> <p>13 three, five. Please take a look at the document and let</p> <p>14 me know if you recognize it?</p> <p>15 MR. KLUFT: Can I ask a question? There's</p> <p>16 a front page that actually says exhibit six. Is that</p> <p>17 part of the exhibit or is that sort of superfluous?</p> <p>18 Q. That is part of the document as it was produced</p> <p>19 by KDT.</p> <p>20 MR. KLUFT: Okay.</p> <p>21 Q. Just is a coincidence that it's also exhibit</p> <p>22 six.</p> <p style="text-align: right;">Page 77</p>

<p>1 A. And what was your question?</p> <p>2 Q. Do you recognize what this document is?</p> <p>3 A. Nope.</p> <p>4 Q. So I'll represent that this is a copy of an</p> <p>5 article that was published in the Journal of the</p> <p>6 American Optometric Association in July in 1983. If you</p> <p>7 can please turn to page ending in bates number three,</p> <p>8 two, three, four, zero. And just looking at the two</p> <p>9 cards that are shown in figure one and figure two, what</p> <p>10 are those figures showing just without looking at any</p> <p>11 documents?</p> <p>12 A. Well, it looks like it's the demonstration card</p> <p>13 in the first card of our -- the King-Devick Test.</p> <p>14 Q. And looking at the next page at the bates</p> <p>15 number, ending three, two, three, four, one and looking</p> <p>16 at figure three, do you recognize what that is?</p> <p>17 A. It looks like our second sheet of our test.</p> <p>18 Q. And then looking down at figure four?</p> <p>19 A. Looks like the third one.</p> <p>20 Q. And then looking down at figure five, do you</p> <p>21 recognize what that is?</p> <p>22 A. Well, it looks like it's part of our scoring</p> <p style="text-align: right;">Page 78</p>	<p>1 NYSOA KD Test?</p> <p>2 A. Yes.</p> <p>3 Q. Do you recognize any of those names?</p> <p>4 A. I do not.</p> <p>5 Q. You don't know any of these three authors?</p> <p>6 A. No.</p> <p>7 Q. Do you know how the authors of this paper would</p> <p>8 have received a copy of -- how they would have received</p> <p>9 a copy of the KD test in 1979?</p> <p>10 MR. KLUFT: Objection. Foundation. You can</p> <p>11 answer if you know.</p> <p>12 A. I do not know.</p> <p>13 Q. Do you know how the authors of this paper may</p> <p>14 have seen a copy of your senior paper in 1979?</p> <p>15 MR. KLUFT: Objection. Foundation. You can</p> <p>16 answer.</p> <p>17 A. I don't.</p> <p>18 Q. You can set the document aside. Are you aware</p> <p>19 that there's a copyright registration for the</p> <p>20 King-Devick Test?</p> <p>21 A. Yes.</p> <p>22 Q. And how do you know that?</p> <p style="text-align: right;">Page 80</p>
<p>1 sheet with.</p> <p>2 Q. And is this part of the scoring sheet that you</p> <p>3 wrote when you were writing the senior paper?</p> <p>4 MR. KLUFT: Objection. You can answer if</p> <p>5 you know.</p> <p>6 A. It looks like it. I can't tell you for sure.</p> <p>7 Q. So if you turn to the page that's ending on --</p> <p>8 so the same page three, two, three, four, one. You see</p> <p>9 at the the last full paragraph on the right-hand side of</p> <p>10 the document, it says in 1979 the NYSOA conducted a</p> <p>11 pre-pilot study on a school screening battery. Do you</p> <p>12 see that sentence?</p> <p>13 A. Yes.</p> <p>14 Q. Do you recall a pre-pilot study that used the</p> <p>15 King-Devick Test?</p> <p>16 MR. KLUFT: Objection. You can answer if</p> <p>17 you know.</p> <p>18 A. I don't recall.</p> <p>19 Q. And then turning to the page of this document</p> <p>20 ending in bates number three, two, three, three, nine.</p> <p>21 A. Yes.</p> <p>22 Q. Do you see the three authors names underneath</p> <p style="text-align: right;">Page 79</p>	<p>1 A. Dr. Devick.</p> <p>2 Q. Were you involved in applying for that copyright</p> <p>3 registration?</p> <p>4 A. Don't remember.</p> <p>5 Q. Do you recall discussing the copyright</p> <p>6 application with Mr. Devick?</p> <p>7 A. Yes.</p> <p>8 Q. Do you recall around when that was?</p> <p>9 A. I do not.</p> <p>10 Q. Do you recall whether that was after you</p> <p>11 graduated from the Illinois College of Optometry?</p> <p>12 A. I really don't recall any of it.</p> <p>13 Q. Do you recall when Mr. Devick told you that</p> <p>14 there was a registration for the King-Devick Test?</p> <p>15 MR. KLUFT: Objection. Foundation. You can</p> <p>16 answer.</p> <p>17 A. Don't recall.</p> <p>18 Q. Do you still own any rights to the King-Devick</p> <p>19 Test today?</p> <p>20 A. I'm a stockholder, yes.</p> <p>21 Q. You're a stockholder of what company?</p> <p>22 A. King-Devick Test -- I don't even know what</p> <p style="text-align: right;">Page 81</p>

<p>1 A. No.</p> <p>2 Q. Do you see that there are numbers that goes</p> <p>3 straight vertically on the far left side of digit card</p> <p>4 three in exhibit eight?</p> <p>5 A. Yes.</p> <p>6 Q. Do you see in exhibit three that there are</p> <p>7 numbers in a straight line vertically on the far left on</p> <p>8 test card three?</p> <p>9 A. Yes.</p> <p>10 Q. Is that a similarity between the two test cards?</p> <p>11 MR. KLUFT: Objection, argumentative. You</p> <p>12 can answer.</p> <p>13 A. I guess it would be.</p> <p>14 Q. Now, looking at these two test cards, are there</p> <p>15 any other similarities that you see?</p> <p>16 MR. KLUFT: Objection. Asked and answered.</p> <p>17 A. Again, no. The spacing is different. Everything</p> <p>18 is different.</p> <p>19 Q. Now, looking just at exhibit eight on the digit</p> <p>20 card three, if you were to read the numbers from left to</p> <p>21 right on this card, would that test saccadic function?</p> <p>22 MR. KLUFT: Objection. You can answer.</p> <p style="text-align: right;">Page 94</p>	<p>1 MR. KLUFT: Objection. Asked and answered.</p> <p>2 A. I would.</p> <p>3 Q. I think that's all I have.</p> <p>4 MR. KLUFT: I have a couple questions and</p> <p>5 it'll be a minute.</p> <p>6 BY MR. KLUFT CROSS EXAMINATION</p> <p>7 Q. Dr. King, again, my name is Dave Kluff. I</p> <p>8 represented you in this deposition. I also represent</p> <p>9 King-Devick. I just had a couple of questions. The town</p> <p>10 that you first moved to after graduating, what was the</p> <p>11 name of it?</p> <p>12 A. Langdon.</p> <p>13 Q. And how do you spell that?</p> <p>14 A. L-a-n-g-d-o-n?</p> <p>15 Q. And you said that's in the northeast corner of</p> <p>16 Montana -- North Dakota?</p> <p>17 A. North Dakota.</p> <p>18 Q. Abutting Canada?</p> <p>19 A. It's 12 miles from Canada and 20 miles from</p> <p>20 Minnesota.</p> <p>21 Q. And what was the population approximately of</p> <p>22 Langdon when you moved there?</p> <p style="text-align: right;">Page 96</p>
<p>1 A. Again, i have not done any research on this</p> <p>2 card. I have no idea.</p> <p>3 Q. Without doing research, would you be able to</p> <p>4 tell whether it tests saccades or not?</p> <p>5 A. No.</p> <p>6 Q. So turning back to the digit card one on the</p> <p>7 page prior, you'd mentioned that you would think that</p> <p>8 this digit card one would not be able to test saccadic</p> <p>9 function. Is that right?</p> <p>10 MR. KLUFT: Objection. Mischaracterizes</p> <p>11 his testimony. You can answer.</p> <p>12 A. Again, I haven't done any research on this. I</p> <p>13 have no idea.</p> <p>14 Q. Well, you had previously said definitely not?</p> <p>15 A. Well, that's because of the equal spacing in the</p> <p>16 first two lines. It doesn't test saccades.</p> <p>17 Q. So you're not able to look at digit card three</p> <p>18 on the next page and the spacing and see whether or not</p> <p>19 it tests saccades?</p> <p>20 A. No.</p> <p>21 Q. You would need to do research on these cards to</p> <p>22 be able to tell that?</p> <p style="text-align: right;">Page 95</p>	<p>1 A. About 2,000.</p> <p>2 Q. Did they have a copy shop?</p> <p>3 A. I don't think so.</p> <p>4 Q. That's all I have. We're done. Great.</p> <p>5 VIDEOGRAPHER: This concludes the</p> <p>6 deposition. We are going off the record at 4:05 p.m.</p> <p>7 (This deposition concluded at 4:05 p.m.)</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p style="text-align: right;">Page 97</p>

EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

KING-DEVICK TEST, INC.,
Plaintiff,

v.

NYU LANGONE HOSPITALS,
NEW YORK UNIVERSITY,
STEVEN L. GALETTA and
LAURA J. BALCER,

Defendants.

-----x

Civil Action No. 17-CV-09307-JPO

-----x

*** CONFIDENTIAL ***

October 30, 2018

9:00 a.m.

CONFIDENTIAL video deposition of
STEVEN D. DEVICK, VOLUME I, taken by Defendants,
pursuant to Notice, dated October, 30, 2018, at
the offices of Fish and Richardson P.C., 601
Lexington Avenue, 52nd Floor, New York, New
York, before Brandon Rainoff, a Federal
Certified Realtime Reporter and Notary Public of
the State of New York.

DIGITAL EVIDENCE GROUP
1730 M Street, NW, Suite 812
Washington, D.C. 20036
(202) 232-0646

<p>1 Now, again, with the Neurology® 2 publication, I know that with all the papers, 3 they -- as long as it's the abstract you are 4 quoting, you can use their abstract. And 5 that's -- that's what we were told. 6 Q. Okay. You went to the Illinois 7 College of Optometry. 8 Is that right? 9 A. Yes. 10 Q. Did you graduate? 11 A. Yes. 12 Q. When? 13 A. 1976. 14 Q. What degree did you get? 15 A. An O.D. 16 Q. Are you still involved in that 17 Illinois College of Optometry? 18 A. No. 19 Q. You are not on the board of directors? 20 A. No. 21 Q. When was the last time you were 22 involved with the Illinois College of Optometry?</p> <p style="text-align: right;">Page 102</p>	<p>1 part of his money or not. 2 Q. How much of the company does his wife 3 own? 4 A. A miniscule amount. 5 Q. When did you first meet Alan King? 6 A. 1972. 7 Q. At school? 8 A. Yes. 9 Q. How did that come about? 10 How did you meet him? 11 A. He was in my class. 12 Q. Were you guys roommates? 13 A. No, I -- this wasn't a school that you 14 stayed at, you know. He had an apartment. I 15 had an apartment out in the suburbs. 16 Q. So what was the first class had you 17 together? 18 A. I have no idea. 19 Q. Did you have all your classes 20 together? 21 A. Yes. 22 Q. Is it the situation where the entire</p> <p style="text-align: right;">Page 104</p>
<p>1 A. I think it's been -- I'm going to 2 guess, 10 years ago I was on the board. 3 Q. Okay. Has your involvement since your 4 graduated with the Illinois College of Optometry 5 been anything other than board membership? 6 A. I think I've spoken there a few times 7 at their request. 8 Q. To their students? 9 Or professors? 10 Or what? 11 A. Both. 12 Q. Okay. 13 Anything else? 14 A. I can't specifically -- I'm not -- I 15 guess I'm not thinking of anything other than I 16 know Len Messner, who is the director of eye 17 clinic, and I talk to him very often. 18 Q. He's an investor in your company? 19 A. Yes -- actually, his wife is. 20 Q. He's not personally? 21 A. No -- well, the shares were bought in 22 his wife's name. So I don't know if that was</p> <p style="text-align: right;">Page 103</p>	<p>1 class all took the same classes? 2 A. Yes. 3 Q. I see. 4 How many classes per semester? 5 A. I don't know. 6 Q. Because you don't remember? 7 A. I don't remember. 8 Q. Okay. That's a fair answer. You 9 understand I have to ask these questions. 10 A. This was 1976. 11 Q. And did you do any research with Mr. 12 King other than what's in your senior paper? 13 A. Not that I recall. 14 Q. Okay. I'm going to show you the paper 15 in a minute, but just some -- was it for a 16 particular class? 17 A. No. It was for -- you had to do an 18 original research a paper to graduate, to get 19 your O.D. degree. 20 Q. There is a professor on the front of 21 it -- Schlange? 22 A. Yeah.</p> <p style="text-align: right;">Page 105</p>

<p>1 Q. Is that how you say it?</p> <p>2 A. Schlange -- that's what I say.</p> <p>3 Q. Schlange?</p> <p>4 And who was he?</p> <p>5 A. He was just a teacher down there -- a</p> <p>6 professor down there.</p> <p>7 Q. Did you have classes with him?</p> <p>8 A. I'm sure we did.</p> <p>9 Q. But he was also sort of a supervisor</p> <p>10 for the research?</p> <p>11 A. He didn't play an active role very</p> <p>12 much, I don't think, but, yes. That's -- he was</p> <p>13 assigned to us.</p> <p>14 Q. Do you recall any of the classes that</p> <p>15 you took with Professor Schlange?</p> <p>16 A. No.</p> <p>17 (Pause)</p> <p>18 Q. Do you recall the name of any of the</p> <p>19 courses that you took while you were at the</p> <p>20 Illinois College of Optometry?</p> <p>21 A. Specifically, the name, like, you</p> <p>22 know, geometrical optics?</p> <p style="text-align: right;">Page 106</p>	<p>1 versus the writing, and who would do things?</p> <p>2 A. I don't recall how it was broken up.</p> <p>3 We were both involved.</p> <p>4 Q. What is a saccade?</p> <p>5 A. It's a micro eye movement, rapid eye</p> <p>6 movement.</p> <p>7 Q. What is saccadic fixation?</p> <p>8 A. I think it really probably refers to a</p> <p>9 saccade landing on a fixation. That would be --</p> <p>10 then going on to the next one.</p> <p>11 Q. Did you do research on any other eye</p> <p>12 movement test before you conducted your --</p> <p>13 before doing your paper?</p> <p>14 A. We didn't do research on any other eye</p> <p>15 movement test, no.</p> <p>16 Q. But you refer, of course, to the</p> <p>17 Pierce and the Vincett tests in your paper?</p> <p>18 A. Yes.</p> <p>19 Q. So you didn't do research on those</p> <p>20 beforehand?</p> <p>21 A. We thought we recognized some obvious</p> <p>22 flaws with the products, and that's how the</p> <p style="text-align: right;">Page 108</p>
<p>1 Or physiological optics?</p> <p>2 Or --</p> <p>3 Q. Right.</p> <p>4 A. -- neurology?</p> <p>5 Or -- I mean, is that what you are</p> <p>6 looking for?</p> <p>7 Q. Right.</p> <p>8 A. Well, there is three.</p> <p>9 Q. Any others?</p> <p>10 A. I'd be -- I'm sure that if I thought a</p> <p>11 lot -- I mean, probably ethology, ocular</p> <p>12 pathology -- you know, all kind of things like</p> <p>13 that -- whatever you think an optometrist would</p> <p>14 take, we took it.</p> <p>15 Q. In what class did you first -- were</p> <p>16 you first exposed to the Pierce test?</p> <p>17 A. I don't recall.</p> <p>18 Q. Whose idea was it between you and Mr.</p> <p>19 King to do the research together?</p> <p>20 A. It was our mutual idea.</p> <p>21 Q. Do you recall how it came about, in</p> <p>22 terms of whose idea it was to do the test,</p> <p style="text-align: right;">Page 107</p>	<p>1 King-Devick test came to be.</p> <p>2 Q. Doctor Schlange -- you first met him</p> <p>3 at school, I presume?</p> <p>4 A. Yes.</p> <p>5 Q. You don't remember the first class you</p> <p>6 had with him?</p> <p>7 A. I don't.</p> <p>8 Q. Did you talk to him after you</p> <p>9 graduated?</p> <p>10 A. I'm not sure that -- maybe I've said</p> <p>11 hello to him. I've never had any in-depth</p> <p>12 conversation with him about anything.</p> <p>13 Q. What is the last time you spoke with</p> <p>14 him?</p> <p>15 A. Could be 30 years.</p> <p>16 Q. I may have asked you this: How did</p> <p>17 you first learn about the Pierce saccade test?</p> <p>18 A. I'm sure in a class.</p> <p>19 Q. Do you remember which one?</p> <p>20 A. I don't.</p> <p>21 Q. Do you remember if it was in a</p> <p>22 textbook?</p> <p style="text-align: right;">Page 109</p>

<p>1 A. I don't.</p> <p>2 Q. Or a professor?</p> <p>3 A. I don't.</p> <p>4 Q. Did you ever personally meet Dr.</p> <p>5 Pierce?</p> <p>6 A. Yeah, I saw him speak and I thought he</p> <p>7 was a good speaker.</p> <p>8 Q. When did you see him speak?</p> <p>9 A. Sometime in 1975 and at, I believe, a</p> <p>10 conference in Minnesota -- central conference.</p> <p>11 Q. So I think Dr. King mentioned that at</p> <p>12 his deposition as well.</p> <p>13 You were there for that, right?</p> <p>14 A. I was there at least once with him,</p> <p>15 and he talked about twice.</p> <p>16 I can't remember if I was there the</p> <p>17 second time.</p> <p>18 Q. I'm sorry. That was a bad question.</p> <p>19 You were at Dr. King's deposition,</p> <p>20 correct?</p> <p>21 A. I was.</p> <p>22 Q. Do you remember him mentioning that he</p> <p style="text-align: right;">Page 110</p>	<p>1 I can't remember who else was in the</p> <p>2 car or anything about it.</p> <p>3 Q. Were you presenting at this</p> <p>4 conference?</p> <p>5 A. No, I was a student.</p> <p>6 Q. This is --</p> <p>7 A. Oh, the first time I met him -- I saw</p> <p>8 him -- was a student.</p> <p>9 Then afterwards, we weren't</p> <p>10 presenting. We were just there. You have to</p> <p>11 get continuing education.</p> <p>12 Q. I see.</p> <p>13 So the first time you met Dr. Pierce</p> <p>14 was as a student?</p> <p>15 A. Yeah, I saw him talk. He wouldn't</p> <p>16 remember me, but I see saw him talk.</p> <p>17 Q. Where was that?</p> <p>18 A. I think it was in the Minnesota. I</p> <p>19 think it was the same thing.</p> <p>20 Q. Because I had understood Dr. King to</p> <p>21 be saying that was after graduation.</p> <p>22 But you think it's before?</p> <p style="text-align: right;">Page 112</p>
<p>1 met Dr. Pierce after graduation -- right after</p> <p>2 graduation?</p> <p>3 Do you remember that?</p> <p>4 A. I do.</p> <p>5 Q. Is that -- you think you were there</p> <p>6 for that one?</p> <p>7 A. I was at the conference. I wasn't</p> <p>8 standing right next to him, no.</p> <p>9 Q. So this was a conference that was in,</p> <p>10 I think, Minneapolis is that correct?</p> <p>11 A. That's what Al said.</p> <p>12 I'd be guessing as well.</p> <p>13 Q. So tell me why you were at that</p> <p>14 conference?</p> <p>15 A. Go to continuing education kind of</p> <p>16 things. And if it was drive-able from Chicago,</p> <p>17 that would be a reason that we would go to one</p> <p>18 of those, rather than fly somewhere.</p> <p>19 Q. Who "we" were you referring to in your</p> <p>20 answer?</p> <p>21 A. Well, you know, in the case of Al King</p> <p>22 for one.</p> <p style="text-align: right;">Page 111</p>	<p>1 A. There was before and after.</p> <p>2 Q. So you were at both?</p> <p>3 Or just the before?</p> <p>4 A. I was at the second one, but I</p> <p>5 didn't -- I wasn't everything the conversation</p> <p>6 with Al that he had.</p> <p>7 Q. Okay. Fine.</p> <p>8 So let's just back up. So I just want</p> <p>9 to make sure I've got it.</p> <p>10 So the first time you met Dr. Pierce</p> <p>11 was before you graduated.</p> <p>12 Is that right?</p> <p>13 A. I heard him speak. It's not like we</p> <p>14 sat down and had lunch.</p> <p>15 Q. I understand.</p> <p>16 Did you have any interaction with him</p> <p>17 at all at that first meeting?</p> <p>18 Do you remember?</p> <p>19 A. I don't.</p> <p>20 Q. Where did you hear him speak?</p> <p>21 A. Like I said, I think it was the</p> <p>22 conference in Minnesota.</p> <p style="text-align: right;">Page 113</p>

<p>1 Q. As a student, you went?</p> <p>2 A. Yes.</p> <p>3 Q. Why were you going to that conference?</p> <p>4 A. Because they encouraged students to go</p> <p>5 to all those things, you know, basically just --</p> <p>6 it was continuing education.</p> <p>7 Q. So you weren't presenting at that</p> <p>8 conference?</p> <p>9 A. No.</p> <p>10 Q. Were any students presenting?</p> <p>11 A. I don't know.</p> <p>12 Q. Then the second time you met Dr.</p> <p>13 Pierce was when?</p> <p>14 A. Like I said, I wasn't involved in the</p> <p>15 conversation that Al had with Pierce the second</p> <p>16 time he -- as he described in his deposition.</p> <p>17 Q. Okay. That was also in Minnesota,</p> <p>18 right?</p> <p>19 A. I think so --</p> <p>20 Q. Okay. But you --</p> <p>21 A. -- that's the one we commonly went to,</p> <p>22 because it was driving distance and it was a big</p> <p style="text-align: right;">Page 114</p>	<p>1 him, actually coincidental with turning it in.</p> <p>2 We -- we made some improvements -- we</p> <p>3 thought vast improvements -- on a saccadic</p> <p>4 function test. And he was kind of a guy that we</p> <p>5 wanted onboard with us.</p> <p>6 But he got the package and I verified</p> <p>7 that he got the package -- this was in March of</p> <p>8 '76 -- but he never returned our call.</p> <p>9 And then Al saw him after that.</p> <p>10 Q. Gotcha.</p> <p>11 You sent the test to some other folks</p> <p>12 around that time as well, right?</p> <p>13 A. Yeah. We -- actually, it was a</p> <p>14 product that people -- not a whole lot of</p> <p>15 people -- after we -- after we turned it in,</p> <p>16 would -- made it a product that people could buy</p> <p>17 that I manufactured myself and -- by making</p> <p>18 copies and laminating it. And wasn't a lot of</p> <p>19 people, but some did.</p> <p>20 Q. Okay. And I saw some reference to</p> <p>21 that in some of the documents, so I'll show you</p> <p>22 that in a little bit.</p> <p style="text-align: right;">Page 116</p>
<p>1 conference.</p> <p>2 But I can't verify for sure that's</p> <p>3 where it was.</p> <p>4 Q. No, I understand.</p> <p>5 So do you recall talking with Dr. King</p> <p>6 about his interaction with Dr. Pierce?</p> <p>7 A. I do.</p> <p>8 Q. What do you recall about that?</p> <p>9 A. He said that it was -- that Dr. Pierce</p> <p>10 was cordial, and said that -- something along</p> <p>11 the lines of: He wished he had thought of that,</p> <p>12 because his was certainly a very different kind</p> <p>13 of product.</p> <p>14 Q. I mean that's sort of a neat statement</p> <p>15 to hear from Dr. Pierce at the time, right?</p> <p>16 You are pretty young.</p> <p>17 A. Yeah -- I mean, I didn't -- yeah, that</p> <p>18 was -- I thought it was great.</p> <p>19 Q. How did Dr. Pierce know about the</p> <p>20 test?</p> <p>21 Do you know?</p> <p>22 A. Well, because when we -- I sent it to</p> <p style="text-align: right;">Page 115</p>	<p>1 Tell me about -- did you form a</p> <p>2 company at the time?</p> <p>3 Or you were just doing it as yourself?</p> <p>4 A. We did it as -- like, when we had</p> <p>5 money, we split up the expenses and split up the</p> <p>6 revenue. But it was never more than a few</p> <p>7 hundred dollars -- \$500, maybe, each -- until</p> <p>8 1993.</p> <p>9 And when we -- the major paper -- the</p> <p>10 American Optometry -- American Optometric</p> <p>11 Association Journal published it -- we provided.</p> <p>12 (Pause)</p> <p>13 Q. You say "we."</p> <p>14 That was you and Dr. King, I guess?</p> <p>15 A. Well, I was doing all of it, as he</p> <p>16 testified at his deposition. I was close to</p> <p>17 Chicago. He was out in North Dakota, deep in</p> <p>18 North Dakota.</p> <p>19 MR. GOETZ: Let me just mark the</p> <p>20 senior paper at this point. Mark as Devick</p> <p>21 Exhibit 8 document bearing production numbers</p> <p>22 KDT000001 through 84.</p> <p style="text-align: right;">Page 117</p>

<p>1 (Exhibit Devick 8, Document Bates 2 stamped KDT0000001 through 84, multipage 3 document entitled: The Proposed King-Devick 4 Saccade Test and its Relation to the Pierce 5 Saccade Test and Reading Levels, dated March, 6 1976, marked for identification) 7 BY MR. GOETZ: 8 Q. Ask you what that is? 9 A. This is the senior research project 10 that we turned in in March of 1976. 11 Q. Okay. And so this is the project -- 12 this is the paper that you and Dr. King 13 submitted. 14 Is that right? 15 A. Yes. 16 Q. Who wrote the words of the actual 17 report? 18 A. We were both involved in the aspects 19 of it. I think he said that he was more 20 involved in the test. 21 I don't remember it that way. I think 22 we were both equally involved in the whole</p> <p style="text-align: right;">Page 118</p>	<p>1 A. I don't know. I was involved in it, 2 without a doubt. 3 Q. So if I go through each section and 4 ask you who specifically wrote the words, are 5 you going to give me basically the same answer 6 each time? 7 A. Yes. 8 Q. And that answer is what? 9 A. I'm not sure which one of us did. We 10 were both equally involved in this -- you know, 11 this project. 12 Q. It was either one of you, or the 13 other? 14 It was no one else? 15 A. Right. 16 Q. Okay. Do you recall who did the 17 little graphs in the paper? 18 A. We both did. 19 Q. Same answer, basically? 20 A. Same answer. 21 Q. Okay. Fine. 22 You agree that the words in this</p> <p style="text-align: right;">Page 120</p>
<p>1 thing. 2 Q. Fair enough. 3 Turn to Exhibit -- this is Exhibit 4 8 -- Exhibit 8, page 3 the abstract. 5 Did you write the abstract? 6 Or did he? 7 Do you remember? 8 A. I don't. 9 Q. But it was one of you, right? 10 A. It was by both of us. 11 Q. Okay. Fair enough. 12 Who decided to name it King-Devick 13 test? 14 A. Well, we flipped a coin. There was Al 15 King and Steve Devick, so we flipped a coin. 16 Q. King won? 17 A. King won. 18 Q. The coin flip would be to see who was 19 the first-named guy? 20 A. Yes. 21 Q. What about the table of contents? 22 Did you write the table of content?</p> <p style="text-align: right;">Page 119</p>	<p>1 report are true and accurate when you submitted 2 it, right? 3 A. I assumed that they were true and 4 accurate as we submitted it. I don't remember 5 in any way falsifying anything. 6 Q. There is nothing -- you haven't over 7 the years gone back and said, "Oh, gosh, I would 8 like to change something I said in this report," 9 have you? 10 A. Yeah -- I haven't seen this in a long 11 time. 12 Q. When is the last time you saw this 13 document? 14 A. I saw it at Al King's deposition. 15 Q. When was the last time you saw it 16 before that? 17 A. I have a dusty copy somewhere in my 18 office, and the library at the optometry school 19 sent me a copy. 20 They said -- I didn't know they had 21 four copies, but they sent me one and -- they 22 sent me several, actually. But --</p> <p style="text-align: right;">Page 121</p>

<p>1 Q. Okay. Fair enough.</p> <p>2 You don't peruse it every once in a</p> <p>3 while, just reminisce about it?</p> <p>4 A. I think that the one thing that the</p> <p>5 point of this, as compared to Pierce, was that</p> <p>6 we thought that Pierce -- you know, we wanted to</p> <p>7 eliminate the habituation and the anticipation</p> <p>8 of a saccade test; in other words, make it a</p> <p>9 true eye movement test, rather than something</p> <p>10 you get -- anticipate or habituate.</p> <p>11 And his was not like that at all.</p> <p>12 Q. Fair enough.</p> <p>13 Do you agree with Dr. King's testimony</p> <p>14 about who contributed to what in terms of the</p> <p>15 test itself?</p> <p>16 A. No.</p> <p>17 Q. Tell me why you disagree.</p> <p>18 A. Because we both worked on all of it.</p> <p>19 Q. So Dr. King seemed to be saying that</p> <p>20 he thought of a lot of it.</p> <p>21 A. He did.</p> <p>22 Q. You agree with that -- that that was</p> <p style="text-align: right;">Page 122</p>	<p>1 We wanted to have five numbers on a</p> <p>2 line, unlike Pierce, who had two.</p> <p>3 He also had -- there were such</p> <p>4 separation in his test that it wasn't really a</p> <p>5 reading-related saccade in our mind, because you</p> <p>6 never move eight, 12 inches in a reading</p> <p>7 saccade.</p> <p>8 And we also said that we wanted to</p> <p>9 have a test that we could do potentially in</p> <p>10 around a minute and it had progressively harder</p> <p>11 cards; key thing being that it was randomly</p> <p>12 spaced but not too wide a space that wouldn't be</p> <p>13 the act of reading.</p> <p>14 And we liked starting and stopping at</p> <p>15 the same point, more or less. He did that, but</p> <p>16 he had no numbers on the line. So, again, it</p> <p>17 was --</p> <p>18 Q. Who "he"?</p> <p>19 A. Dr. Pierce's test.</p> <p>20 Q. Okay. Fine.</p> <p>21 A. And so, you know, we -- we think</p> <p>22 that -- we were excited to tell him how we'd</p> <p style="text-align: right;">Page 124</p>
<p>1 the sense of his testimony?</p> <p>2 A. He testified to the point that he said</p> <p>3 that he thought he put together the test numbers</p> <p>4 in the sequence.</p> <p>5 And I don't remember it that way, but</p> <p>6 it's possible.</p> <p>7 We talked about every aspect of this</p> <p>8 all the time.</p> <p>9 Q. How do you remember it?</p> <p>10 A. I remember working together with him</p> <p>11 on the whole thing.</p> <p>12 Q. So in your -- what's your testimony</p> <p>13 about who thought about the spacing?</p> <p>14 Whose idea was that?</p> <p>15 A. We both did.</p> <p>16 Q. What's your testimony about who</p> <p>17 thought about the numbers to use?</p> <p>18 A. Well, I mean, again, we -- I can't</p> <p>19 remember who picked out what number in what</p> <p>20 order.</p> <p>21 But we knew that we wanted to have</p> <p>22 three things.</p> <p style="text-align: right;">Page 123</p>	<p>1 fixed a lot of things about his initial</p> <p>2 thoughts, we thought, with a test of saccades</p> <p>3 because we didn't even think his test really</p> <p>4 measured reading-related saccades.</p> <p>5 Q. If I asked, "What did you contribute</p> <p>6 do the actual test itself?" what would you say?</p> <p>7 A. I would say what I have said the last</p> <p>8 three or four questions -- that we equally</p> <p>9 contributed.</p> <p>10 Q. What did Dr. King contribute to the</p> <p>11 test itself?</p> <p>12 A. Again, as I said before, just</p> <p>13 answered.</p> <p>14 Q. Okay. How long did it take you to</p> <p>15 develop the King-Devick test itself?</p> <p>16 A. I don't recall.</p> <p>17 Q. Let me be clear.</p> <p>18 So Appendix 2's is the test itself,</p> <p>19 right?</p> <p>20 (Pause)</p> <p>21 Q. Actually, I take that back.</p> <p>22 Appendix 2 is the test itself, and</p> <p style="text-align: right;">Page 125</p>

<p>1 matched by his age.</p> <p>2 Q. How long did it take you to develop</p> <p>3 with Dr. King the King-Devick test itself?</p> <p>4 A. It took a while. We -- you know,</p> <p>5 it's -- I think that we did good work on it.</p> <p>6 And it wasn't overnight. And we did a sampling</p> <p>7 of a -- you know, we did a good research project</p> <p>8 and double-blind study.</p> <p>9 And, you know, again, it became pretty</p> <p>10 known very early.</p> <p>11 Q. I want to talk about that in a second.</p> <p>12 But do you think it took, like, weeks</p> <p>13 to put together?</p> <p>14 Or months?</p> <p>15 A. I think it took months.</p> <p>16 Q. Months. Okay.</p> <p>17 Is it fair to say that the test itself</p> <p>18 is an attempt to improve on the Pierce test?</p> <p>19 A. Well, it's nothing like the Pierce</p> <p>20 test. So --</p> <p>21 Q. But you think it's better though,</p> <p>22 right?</p> <p style="text-align: right;">Page 130</p>	<p>1 Q. Did you make any changes when</p> <p>2 developing the test itself?</p> <p>3 A. I'm not sure what that means.</p> <p>4 Q. Did you have an initial draft of the</p> <p>5 test that had different spacing, for example, or</p> <p>6 different numbers?</p> <p>7 A. I don't think that we did.</p> <p>8 We toyed around with the idea of</p> <p>9 having a circular motion of a test, which was a</p> <p>10 smooth pursuit -- different kind of eye</p> <p>11 movement.</p> <p>12 But we ended up sticking with</p> <p>13 saccades.</p> <p>14 Q. Other than that, do you recall making</p> <p>15 any changes to the test itself during the</p> <p>16 development?</p> <p>17 A. During the development? I really</p> <p>18 don't recall. This was -- that would be 1975.</p> <p>19 Q. I understand.</p> <p>20 Did you have any input from anyone</p> <p>21 other than Dr. King when developing the test</p> <p>22 itself?</p> <p style="text-align: right;">Page 132</p>
<p>1 A. Well, if you mean -- well, I think</p> <p>2 whether I think it's better than the Pierce test</p> <p>3 is whether I thought it would improve.</p> <p>4 I mean, there is nothing like -- he</p> <p>5 doesn't have numbers outside of the edges of a</p> <p>6 piece of typing paper. I mean, you know,</p> <p>7 he's -- there is no -- I would call what he</p> <p>8 does -- did -- and, you know we wanted -- he, I</p> <p>9 think, he agreed with us is his test wasn't for</p> <p>10 reading-related saccades.</p> <p>11 Q. But your test was an attempt to</p> <p>12 improve on what he had done.</p> <p>13 Is that fair?</p> <p>14 A. Our test was to make a test for</p> <p>15 reading-related saccades.</p> <p>16 His were not reading-related saccades</p> <p>17 because they were too far apart.</p> <p>18 I mean, you don't read from here to</p> <p>19 here. That's all he tested -- here to here.</p> <p>20 And he also had habituation and</p> <p>21 anticipation, because you went to the same spot</p> <p>22 every time you moved your eyes.</p> <p style="text-align: right;">Page 131</p>	<p>1 A. No.</p> <p>2 Q. Do you know approximately just looking</p> <p>3 at the date of the document and your memory,</p> <p>4 when did you arrive at the test in the form</p> <p>5 shown in Appendix 2 -- approximately what date?</p> <p>6 A. It was the fall of 1975, because we</p> <p>7 did the research at a school in the fall of</p> <p>8 1975.</p> <p>9 Q. Do you agree it doesn't matter what</p> <p>10 numbers you use for the King-Devick test?</p> <p>11 A. As long as there is single digits and</p> <p>12 that we -- all our validation studies related to</p> <p>13 this kind of spacing.</p> <p>14 Q. And they can't be consecutively</p> <p>15 numbered.</p> <p>16 Is that right?</p> <p>17 A. Absolutely not.</p> <p>18 Q. Tell me why you react in that way?</p> <p>19 A. Because here is my King-Devick test</p> <p>20 consecutive number: One, two, three, four,</p> <p>21 five, six, seven, eight, nine, ten.</p> <p>22 How did I do?</p> <p style="text-align: right;">Page 133</p>

<p>1 Q. Why is that?</p> <p>2 Why does that defeat the purpose of</p> <p>3 the test?</p> <p>4 A. Because you don't even need to look at</p> <p>5 the numbers.</p> <p>6 Q. Did the King-Devick test -- does the</p> <p>7 King-Devick test have anything to do with ocular</p> <p>8 motor efficiency?</p> <p>9 A. I think it does.</p> <p>10 Q. What is -- for the record here, so we</p> <p>11 have it, what is ocular motor efficiency?</p> <p>12 A. I think it's a term related --</p> <p>13 typically described as it relates to reading --</p> <p>14 but it can be just in general -- where you are</p> <p>15 efficient at going from one -- in the case of</p> <p>16 this test -- one fixation target to the next as</p> <p>17 fast and as accurately as you can without making</p> <p>18 mistakes.</p> <p>19 Q. When did you first come across the</p> <p>20 notion of ocular motor efficiency?</p> <p>21 A. I think that was the basis of this</p> <p>22 test from the start, as it related to reading.</p> <p style="text-align: right;">Page 134</p>	<p>1 better than the Pierce test; and really, in</p> <p>2 reality, we were a lot better than the Pierce</p> <p>3 test.</p> <p>4 But we sent it to him. And we wanted</p> <p>5 to be -- honestly, I think -- I would have liked</p> <p>6 to collaborate with him. But he never got back</p> <p>7 to us.</p> <p>8 And we verified he got the product and</p> <p>9 the paper. But he never accounted to us on it</p> <p>10 until Al saw him a year or later.</p> <p>11 Q. I want to talk more about that.</p> <p>12 But I want to go to page 3 of Exhibit</p> <p>13 8 here where you say, "We designed the test,</p> <p>14 which was a modification of the Pierce and</p> <p>15 Vincett tests" right in the middle there.</p> <p>16 Do you see those words?</p> <p>17 A. Yeah -- it was probably a poor choice</p> <p>18 of words.</p> <p>19 But we looked at the Vincett test --</p> <p>20 which was equally-spaced letters.</p> <p>21 Now, in Al King's deposition, you saw</p> <p>22 that he had equally-spaced numbers -- I never</p> <p style="text-align: right;">Page 136</p>
<p>1 Q. Okay. And is that -- this notion of</p> <p>2 ocular motor efficiency -- something you learned</p> <p>3 in school, I take it?</p> <p>4 A. We learned the word "ocular motor" in</p> <p>5 school.</p> <p>6 I'm not sure where the efficiency part</p> <p>7 came.</p> <p>8 But -- and again, I'm not -- you know,</p> <p>9 that's ocular motor efficiency is like -- this</p> <p>10 is what it is. "Ocular motor" is the movements</p> <p>11 of your eyes. "Efficiency" would mean that you</p> <p>12 can land on a target that you were aiming for in</p> <p>13 a fairly accurate way.</p> <p>14 Q. Do you agree your test was a modified</p> <p>15 version of the Pierce test?</p> <p>16 A. I don't know that I do. I mean, we --</p> <p>17 our -- it really isn't.</p> <p>18 I know it says that in the -- we were</p> <p>19 hoping that Dr. Pierce would like this and</p> <p>20 perhaps incorporate it into his products.</p> <p>21 And he was -- we were kinder to him in</p> <p>22 this paper, relative to saying we were a little</p> <p style="text-align: right;">Page 135</p>	<p>1 saw that -- and as Pierce, you know had wide</p> <p>2 non-reading-related saccades.</p> <p>3 So perhaps we shouldn't have put</p> <p>4 "modified" because it was a completely different</p> <p>5 test in the way it tested your eye movements.</p> <p>6 But, in fact, that's what it did say.</p> <p>7 Q. So we agree it says that your test was</p> <p>8 a modification of the Pierce and Vincett test,</p> <p>9 right?</p> <p>10 A. Well, it says that it says.</p> <p>11 Q. Right.</p> <p>12 But you disagree with that now.</p> <p>13 Is that fair?</p> <p>14 A. Well, it's really -- again, we were --</p> <p>15 it's somewhat, I think, patronizing to Jeff</p> <p>16 Pierce, because we wanted him to like our test.</p> <p>17 And he was -- and maybe use him -- you know,</p> <p>18 with us, or modify his to do it.</p> <p>19 So the bottom line is is that that's</p> <p>20 what it says.</p> <p>21 Q. Sitting here today, do you think that</p> <p>22 the King-Devick test is a modification of the</p> <p style="text-align: right;">Page 137</p>

<p>1 Pierce test?</p> <p>2 A. I guess that it's a -- it doesn't test</p> <p>3 any of the same things that Pierce tests,</p> <p>4 knowing what I know now.</p> <p>5 The demonstration -- there is no</p> <p>6 numbers in the -- I mean, I guess it's -- I'm</p> <p>7 not sure that I would ever say that if I was</p> <p>8 specifically saying, "We want to modify</p> <p>9 something to perform the same function that the</p> <p>10 prior thing -- prior test functioned."</p> <p>11 It says that I said that back then. I</p> <p>12 don't necessarily agree with that now, but</p> <p>13 that's what it says in my 1976 paper.</p> <p>14 Q. Fair enough.</p> <p>15 So sounds like you don't agree with</p> <p>16 that today.</p> <p>17 Fair?</p> <p>18 A. Well, I don't -- yeah -- I wouldn't</p> <p>19 say that it wasn't something that we factored</p> <p>20 in, for sure.</p> <p>21 It was -- it was -- when you look at</p> <p>22 it from the demo card and the fact that the</p> <p style="text-align: right;">Page 138</p>	<p>1 MR. SULLIVAN: Sorry. I'm having</p> <p>2 trouble following --</p> <p>3 THE WITNESS: It is right down here.</p> <p>4 MR. GOETZ: Page 13.</p> <p>5 MR. SULLIVAN: What's the Bates No.?</p> <p>6 MR. GOETZ: Thirteen.</p> <p>7 MR. SULLIVAN: Oh, that's the problem.</p> <p>8 There are numbers on top that say 13.</p> <p>9 MR. GOETZ: KDT00000 --</p> <p>10 MR. SULLIVAN: I was looking at the</p> <p>11 top numbers. Go ahead.</p> <p>12 MR. GOETZ: No problem.</p> <p>13 A. So the part of the Pierce test that it</p> <p>14 -- there was no part of it that -- the most</p> <p>15 important part of our test is the fact that</p> <p>16 there is randomly-spaced numbers between the</p> <p>17 outside edges.</p> <p>18 Pierce only had the outside edges.</p> <p>19 We also made it such that there was</p> <p>20 no -- we had the same amount of numbers on a</p> <p>21 line -- five -- so there was -- we tried to make</p> <p>22 the distances varying degrees of separate, but</p> <p style="text-align: right;">Page 140</p>
<p>1 arrows, it looks like -- so I don't know what</p> <p>2 I'd say about it.</p> <p>3 I always gave -- we always gave as</p> <p>4 much credit as we could to Pierce. And I</p> <p>5 think -- I think he liked our stuff.</p> <p>6 (Pause)</p> <p>7 Q. If you turn to page 13 of Exhibit 8,</p> <p>8 it says -- I'm reading from the last --</p> <p>9 second-to-last sentence in the second full</p> <p>10 paragraph.</p> <p>11 It says: Our test follows the same</p> <p>12 basic format as the Pierce saccade test.</p> <p>13 Do you see those words?</p> <p>14 A. How far down is it?</p> <p>15 Q. It's the second-to-last sentence in</p> <p>16 the second full paragraph on page 13.</p> <p>17 A. I see that.</p> <p>18 Q. You see those words?</p> <p>19 A. I do.</p> <p>20 Q. Do you agree with that?</p> <p>21 A. As I did a poor job of answering</p> <p>22 before --</p> <p style="text-align: right;">Page 139</p>	<p>1 not too separate to be called a reading saccade.</p> <p>2 Pierce did none of that.</p> <p>3 So I don't know how quite how to</p> <p>4 answer that.</p> <p>5 Q. Let's just go back because it was a</p> <p>6 little -- just so it's clear.</p> <p>7 You see the words: Our test follows</p> <p>8 the same basic format as the Pierce saccade</p> <p>9 test.</p> <p>10 Right?</p> <p>11 A. That's what it says.</p> <p>12 Q. Do you disagree with that today?</p> <p>13 A. Except for the things I just</p> <p>14 mentioned.</p> <p>15 I just clarified that they -- the</p> <p>16 format being three or four cards -- that has --</p> <p>17 if that's the format, ours is now obviously not</p> <p>18 on flip charts. It's an iPad.</p> <p>19 But it did at one point have the same</p> <p>20 number of cards that Pierce had.</p> <p>21 Q. So to that extent, you agree with that</p> <p>22 statement still.</p> <p style="text-align: right;">Page 141</p>

<p>1 Fair?</p> <p>2 A. Yes.</p> <p>3 (Pause)</p> <p>4 Q. You didn't get a license from Cook to</p> <p>5 use the Pierce test in your study.</p> <p>6 Is that right?</p> <p>7 A. No, we actually had -- Al testified</p> <p>8 that we had copies of the Pierce test. We had</p> <p>9 checked out actual Pierce tests from the</p> <p>10 Illinois Eye Institute, where we were -- provide</p> <p>11 us the equipment.</p> <p>12 Q. So you didn't need a license to --</p> <p>13 A. We didn't need a license.</p> <p>14 We had original version of the Pierce</p> <p>15 test to do our test, and we had two original</p> <p>16 versions.</p> <p>17 Q. I think you've mentioned this in</p> <p>18 response to other questions.</p> <p>19 But let me just ask you: How is the</p> <p>20 King-Devick test different than the Pierce</p> <p>21 saccade test?</p> <p>22 A. Pierce saccade -- first of all, it's</p> <p style="text-align: right;">Page 142</p>	<p>1 test saccades related to reading.</p> <p>2 Q. You say Dr. Pierce sort of wished he</p> <p>3 thought of that --</p> <p>4 A. That's what Al King said he said to</p> <p>5 him.</p> <p>6 Q. Do you remember Al King saying that to</p> <p>7 you at the time?</p> <p>8 A. I do.</p> <p>9 Q. Tell me exactly what you remember</p> <p>10 about that conversation between you and Al.</p> <p>11 A. I just thought it was great that Al</p> <p>12 had said that he had -- ran into Pierce and said</p> <p>13 he knew who he was, and something along the</p> <p>14 lines of "I wish I would have -- that -- you</p> <p>15 know, that was good improvements," or whatever.</p> <p>16 I wasn't there, but that's what Al</p> <p>17 said.</p> <p>18 Q. Now, you said you were measuring</p> <p>19 fixation targets in a book.</p> <p>20 Tell me what you meant by that.</p> <p>21 A. Well, before we designed the test, we</p> <p>22 tried to predict, you know, groups of words and</p> <p style="text-align: right;">Page 144</p>
<p>1 not a reading-related saccade test, as we know</p> <p>2 it, because the spacing between the two fixation</p> <p>3 targets in the Pierce are not anything like</p> <p>4 you'd see in normal reading. They are eight or</p> <p>5 10 inches apart.</p> <p>6 And so I wouldn't call it a saccade</p> <p>7 test relative to reading.</p> <p>8 So otherwise, ours has five</p> <p>9 randomly-spaced numbers between the two --</p> <p>10 between the two end point targets. They aren't</p> <p>11 too far apart, such that it wouldn't be like the</p> <p>12 act of reading.</p> <p>13 We looked -- and actually looked -- Al</p> <p>14 and I, while we decided the distance, were</p> <p>15 actually measuring things, fixation targets in a</p> <p>16 book, as far as how apart they would be.</p> <p>17 It's wider than ours.</p> <p>18 Again, in retrospect, this probably</p> <p>19 has nothing to do with reading -- these wide</p> <p>20 saccades.</p> <p>21 And I think ultimately he agreed that</p> <p>22 our test was much better test, in fact -- did</p> <p style="text-align: right;">Page 143</p>	<p>1 books and come up with the varying distances</p> <p>2 that we came up with.</p> <p>3 And we found that the key would be</p> <p>4 that they would be different, not random,</p> <p>5 equally-spaced numbers; key being that they</p> <p>6 would have to be different: Some shorter, some</p> <p>7 longer --</p> <p>8 Q. The fixation targets, you mean?</p> <p>9 A. That's right.</p> <p>10 And in Pierce's, they were all --</p> <p>11 there weren't any central fixation targets. It</p> <p>12 was just one side or the other.</p> <p>13 Q. So what is the purpose of the spacing</p> <p>14 in the King-Devick test of the numbers?</p> <p>15 A. To simulate the physical act of</p> <p>16 reading.</p> <p>17 Q. In a way that's different than the</p> <p>18 Pierce test?</p> <p>19 A. We don't think the Pierce test at all</p> <p>20 simulates the physical act of reading.</p> <p>21 Q. Because the numbers are too far apart?</p> <p>22 A. That's right. It has habituation and</p> <p style="text-align: right;">Page 145</p>

<p>1 anticipation, things that we tried to avoid. 2 (Pause) 3 Q. Now, you gave a copy of the test to 4 Pierce. 5 And so, what was the -- Appendix 2. 6 You just made copies of this. 7 And did you put them on cards? 8 A. No, we just sent him a copy of the 9 paper. 10 Q. You sent him a copy of the paper? 11 A. This paper. 12 Q. When did you send that to Pierce? 13 A. Pretty much coincidentally as to when 14 we turned it in. 15 Q. You said earlier that you are sure he 16 got it. 17 How are you so sure? 18 A. Because he didn't get back to us. And 19 I called his office and they said the he had got 20 it. 21 Q. At the time? 22 A. At the time.</p> <p style="text-align: right;">Page 146</p>	<p>1 Q. Did he pay you any money for the test? 2 A. Did he? 3 Q. Yeah. 4 A. No. 5 Q. Was it just sort of a donation? 6 A. Just sent him the paper. We just sent 7 him this paper. 8 Q. Okay. 9 Did you send the paper itself out to 10 anyone else like that? 11 A. Not that I recall. 12 (Pause) 13 BY MR. GOETZ: 14 Q. Just try that one again. 15 Did you send your paper -- right after 16 you submitted you it to the school -- to anyone 17 other than Dr. Pierce? 18 A. Not that I recall. 19 Q. You mentioned earlier that you -- you 20 had said: We started to commercialize a product 21 sort of right away. 22 Is that correct?</p> <p style="text-align: right;">Page 148</p>
<p>1 Q. So you sent it to his office, wherever 2 he was working at the time? 3 A. That's right. 4 Q. Was that in Alabama? 5 A. I think so. 6 Q. You talked to someone there? 7 A. It is not -- I didn't to talk to him. 8 I talked to -- 9 Q. Secretary -- 10 A. -- somebody in his office: Did you 11 get the package? 12 She said: Yes. 13 Q. Did you send him anything other than, 14 you know, the paper, which is Exhibit 8? 15 A. Well, we sent him a note saying that, 16 you know: Check this out, and whatever. 17 I can't remember specifically what it 18 schedules, but it was a very nice note and meant 19 to be cordial and -- in hopes that he respond. 20 Q. Did you -- do you still have that 21 note? 22 A. No.</p> <p style="text-align: right;">Page 147</p>	<p>1 A. In that case, I was the one that was 2 putting together the copies, putting on our 3 copyright language, and sending them out. 4 We actually sold a few for \$20 plus 5 shipping, which was 25. 6 Q. The "we" there is you and Dr. King? 7 A. Well, he was -- at this point he was 8 pretty much out the door in North Dakota. So I 9 was in charge. 10 And he had testified to that. 11 And all of the, you know, 12 manufacturing, putting together the products, 13 anything like that -- that was me. Always has 14 been. 15 Q. And when did that start? -- 16 A. In March of -- the first one we sent 17 was in March of 1976. 18 Q. And so that was basically co-incident 19 with when you submitted it? 20 A. That's right. 21 Q. Who did you send it to? 22 A. I think that the first one was Floyd</p> <p style="text-align: right;">Page 149</p>

<p>1 Mizener. And he's a 96-year-old. He's still 2 around today. And he was my, kind of, mentor 3 and my own optometrist when I was a kid. So he 4 was the first one, I believe. 5 Q. Who else did you send it to initially? 6 A. We -- we -- what would happen is that 7 people -- the library -- the head master -- the 8 librarian at the library was Peter Weil. 9 He would say people wanted to copy it, 10 because they kept a copy in the library. 11 Actually, Al King told me to check on 12 that once. 13 And he said: You just send them to 14 me. 15 So whenever somebody wanted a copy of 16 it, we would sell him one and it had the 17 copyright language on it. So that's how it 18 worked. 19 Also Dr. Mizener was proud of the 20 paper. And he was a good friend. And he 21 referred it to a lot of others as well. It 22 became a fairly well-known test right away.</p> <p style="text-align: right;">Page 150</p>	<p>1 this litigation that we are sitting in today? 2 A. I did. 3 Q. You couldn't find them? 4 A. There is nothing. 5 Q. Where did you look? 6 A. I looked in where I keep all my tax 7 stuff. 8 Q. No tax records or anything? 9 A. Nothing. 10 Q. Where were you -- did you have a 11 manufacturing facility? 12 Or what were you doing? 13 A. No. I had the -- I went to the 14 Chicago Public Library; used their copy machine; 15 put laminates in between; put it in a folder. 16 As you all saw who were at the Al King 17 deposition -- saw the way it looked. And -- 18 Q. So what are you referring to -- "saw 19 the way it looked"? 20 A. It was in a -- it was in a -- not 21 this, because it wasn't quite hardcover, but one 22 of those things.</p> <p style="text-align: right;">Page 152</p>
<p>1 Q. So this -- let me start with this. 2 Do you remember anyone specifically by 3 name, other than Floyd Mizener, that you sent 4 the test to? -- initially? 5 A. That's been a long time ago. 6 Q. I understand. 7 A. And I would get names from the 8 librarian mostly, and from Floyd, and send them 9 out. 10 I don't right, as we sit here, 11 specifically remember another individual's name. 12 Q. Fine. 13 Do you have any documents that reflect 14 those sales -- those early sales -- today? 15 A. No. I don't. 16 As a matter of fact, we didn't file a 17 separate tax return for them. We filed as 18 income on our individual returns, and it wasn't 19 much. It was less than -- I'm sure it was less 20 than \$600 per -- each of us. 21 Q. Did you look for documents reflecting 22 these very initial sales and -- for purposes of</p> <p style="text-align: right;">Page 151</p>	<p>1 I mean, they had the four pages, and 2 the score card of King-Devick. 3 The one that he had was the paper 4 itself. We didn't include the paper. It was 5 just the test and scorecards. 6 Q. So I want to get that exhibit and 7 we'll take a look at it. 8 A. All he had was the paper itself in the 9 binder that we -- all I'm talking about with the 10 binder was the same -- what kind of looking 11 thing. 12 He had the actual paper he turned in. 13 Q. Oh, like this, just like -- 14 A. Yeah, right. 15 Q. -- I see. 16 A. What I made was four sheets, 17 laminated, copied, with a title page, and a 18 score sheet -- and which later became the NYSOA 19 package. 20 Q. I want to talk about that in a minute. 21 So I want to understand what exactly 22 what you did in March of 1976.</p> <p style="text-align: right;">Page 153</p>

<p>1 So you went to the New York -- I'm</p> <p>2 sorry -- the Chicago Public Library and you put</p> <p>3 on the Xerox machine Appendix 2 --</p> <p>4 A. Well --</p> <p>5 Q. -- demonstration card?</p> <p>6 A. Well, after we had done it and we</p> <p>7 added a our copyright language to it. And as --</p> <p>8 Q. So what copyright language did you</p> <p>9 add?</p> <p>10 A. We added: Copyright© -- with a © --</p> <p>11 1976 by Steve Devick and Al King/King-Devick</p> <p>12 Test All Rights Reserved.</p> <p>13 And later that same copyright language</p> <p>14 is what we insisted that Bernell put into our</p> <p>15 deal with them, although we added "O.D." to our</p> <p>16 name, which I hadn't done before.</p> <p>17 Q. When is the last time you saw one of</p> <p>18 those very, very first, you know, tests that you</p> <p>19 sent out?</p> <p>20 A. I haven't seen them for years.</p> <p>21 Q. So you don't have an old set around --</p> <p>22 A. Well, when we did our deal with</p> <p style="text-align: right;">Page 154</p>	<p>1 that's what brought us to do it -- on his and</p> <p>2 the same with the Vincett -- all had copyright</p> <p>3 language. We did the same.</p> <p>4 And we ran those off at the Chicago</p> <p>5 Public Library -- I ran them off at the Chicago</p> <p>6 Public Library; put them in the laminated thing;</p> <p>7 put them in a flip chart notebook with the name</p> <p>8 on it and with some score sheets.</p> <p>9 Q. Okay.</p> <p>10 And where did you put the copyright</p> <p>11 notice?</p> <p>12 A. We put it on the front, and then on</p> <p>13 the bottom. At that point, we put it on every</p> <p>14 page, because those guys can that. And --</p> <p>15 Q. What guys did what?</p> <p>16 A. Well, Pierce it put on it every page.</p> <p>17 I'm not sure in retrospect that was</p> <p>18 necessary, but I don't know.</p> <p>19 Q. Okay.</p> <p>20 A. Anyway, we put '76.</p> <p>21 I got -- my uncles' friend was an IP</p> <p>22 lawyer. He told us what to say, and that's what</p> <p style="text-align: right;">Page 156</p>
<p>1 Bernell, they made them in a high-gloss vinyl,</p> <p>2 and it was a much better product.</p> <p>3 And no, I don't have any of the old</p> <p>4 ones.</p> <p>5 Q. How did you laminate them?</p> <p>6 Just with --</p> <p>7 A. Stuck them in those laminated sheets</p> <p>8 that you can buy. We didn't do it in a machine.</p> <p>9 It was --</p> <p>10 Q. So not heat sealed?</p> <p>11 A. Not heat sealed.</p> <p>12 Q. I understand.</p> <p>13 So I want to get as much detail as I</p> <p>14 can to understand exactly how you made this --</p> <p>15 the laminated sheet.</p> <p>16 So did you photocopy Appendix 2?</p> <p>17 A. No. Because --</p> <p>18 Q. So, what did you do?</p> <p>19 A. Well, we made a new Appendix 2, which</p> <p>20 wasn't a photocopy, because that's a photocopy</p> <p>21 of something else; and of the copyright</p> <p>22 language -- as did Pierce -- if you noticed, and</p> <p style="text-align: right;">Page 155</p>	<p>1 we did.</p> <p>2 Q. When was the last time you saw one of</p> <p>3 those early laminated, sort of, packets with the</p> <p>4 binder?</p> <p>5 A. Here is the way my -- it's been -- I</p> <p>6 just said that it's been a long, long time.</p> <p>7 Q. Listen to my question.</p> <p>8 When is the last time you saw one?</p> <p>9 A. I can't say, but it's been before the</p> <p>10 Pierce. When we came out with Bernell, we</p> <p>11 never -- with no longer did homemade tests to</p> <p>12 pass out.</p> <p>13 Q. We'll talk about that in a minute.</p> <p>14 But approximately when was that?</p> <p>15 A. The deal -- not Pierce.</p> <p>16 When we did our deal with Bernell, it</p> <p>17 was 1983.</p> <p>18 Q. Okay. So until that time you were</p> <p>19 doing the laminated sheets, making the copies,</p> <p>20 and putting them together, and sending them out</p> <p>21 that way.</p> <p>22 Is that fair?</p> <p style="text-align: right;">Page 157</p>

<p>1 A. Yes. And not a whole huge volume of</p> <p>2 them, but, yes.</p> <p>3 Q. Fair enough.</p> <p>4 But you did actually sell some of</p> <p>5 those in 1976.</p> <p>6 Is that correct?</p> <p>7 A. Yes, and the sales were either from --</p> <p>8 typically from either Dr. Mizener referred them</p> <p>9 or Peter Weil, who is the head librarian</p> <p>10 referred them.</p> <p>11 Q. Do you recall anything about any of</p> <p>12 those sales in 1976?</p> <p>13 Anything?</p> <p>14 Who they were to?</p> <p>15 How much you made?</p> <p>16 Anything?</p> <p>17 A. We made more than -- more than -- our</p> <p>18 costs were very low.</p> <p>19 So I don't have any records of the</p> <p>20 exact names of those people.</p> <p>21 As a matter of fact, when the New York</p> <p>22 did the testing, I don't know if they had gotten</p> <p style="text-align: right;">Page 158</p>	<p>1 Not sure?</p> <p>2 A. Absolutely could have been '77.</p> <p>3 Q. Okay. But there is no doubt in your</p> <p>4 mind that, in 1976, you made sales of the test.</p> <p>5 Fair?</p> <p>6 A. That's right, and they had the</p> <p>7 copyright language on them.</p> <p>8 Q. In 1977?</p> <p>9 A. All those years.</p> <p>10 Q. So in 1978?</p> <p>11 A. Yes.</p> <p>12 Q. Do you have any sense for how many</p> <p>13 sales in terms of dollar value you did in 1976?</p> <p>14 A. Well, not many.</p> <p>15 I mean it was a \$25 -- and I don't</p> <p>16 think -- for sure, we didn't have -- I don't</p> <p>17 think we made -- maybe \$500 each, Al and I.</p> <p>18 Q. Between you and Al?</p> <p>19 A. Hm-hmm.</p> <p>20 Q. In 1976?</p> <p>21 A. I'm guessing. It may not have been</p> <p>22 even that much. And it was all very low.</p> <p style="text-align: right;">Page 160</p>
<p>1 a hold of one from -- by copying something out</p> <p>2 of the library or whatever, when they did their</p> <p>3 follow-up study; or whether somebody from New</p> <p>4 York had bought them.</p> <p>5 There was a guy from New York that had</p> <p>6 bought them. And his name was Len Press -- Dr.</p> <p>7 Len Press. And he might have been the second</p> <p>8 person.</p> <p>9 And he -- these are both -- he was</p> <p>10 young then, but Dr. Mizener was a very, very</p> <p>11 established and well-known O.D. And he was</p> <p>12 proud of the test. He talked about it a lot.</p> <p>13 Q. Dr. Mizener was?</p> <p>14 A. Yes.</p> <p>15 Q. And Len Press -- you think you might</p> <p>16 have sold him some of the tests in 1976?</p> <p>17 A. It's possible.</p> <p>18 Q. You just don't remember?</p> <p>19 A. I know he was an early user.</p> <p>20 Q. Okay. Fine.</p> <p>21 Do you think it could have been, you</p> <p>22 know, '77?</p> <p style="text-align: right;">Page 159</p>	<p>1 So when the Bernell deal came along,</p> <p>2 we thought it was great.</p> <p>3 Q. I understand.</p> <p>4 1976 -- I'm sorry -- 1977 -- was it</p> <p>5 more than the first year?</p> <p>6 A. I don't recall. Wasn't much.</p> <p>7 Q. 1978, was it more?</p> <p>8 Do you recall?</p> <p>9 A. I don't.</p> <p>10 But they all had copyright language on</p> <p>11 them.</p> <p>12 Q. Now, the paper itself was also</p> <p>13 available in your library -- right? -- the ICO</p> <p>14 library?</p> <p>15 A. It was available to look at. They</p> <p>16 didn't let you make copies out of it. And</p> <p>17 again -- copies of it.</p> <p>18 And again, I remember the librarian's</p> <p>19 name, because he was kind of a guy that was --</p> <p>20 didn't want people to copy that and use the</p> <p>21 test. He referred them to me.</p> <p>22 Q. Did you remember that actually</p> <p style="text-align: right;">Page 161</p>

<p>1 happening?</p> <p>2 A. Absolutely.</p> <p>3 Q. Tell me about -- tell me about a</p> <p>4 specific recollection that you have about that.</p> <p>5 A. Peter Weil was the guy's name. And he</p> <p>6 would call me when anybody ever wanted one.</p> <p>7 But --</p> <p>8 Q. What happened in the specific instance</p> <p>9 you are thinking of?</p> <p>10 When was it?</p> <p>11 A. Well, right away, after the -- whoever</p> <p>12 wanted to try to copy the paper, he would say:</p> <p>13 You could talk to Dr. Devick and he will, you</p> <p>14 know, get one to you.</p> <p>15 There may have been others that copied</p> <p>16 it without him catching them.</p> <p>17 But as far as -- I mean, the school</p> <p>18 didn't own a copyright to those -- that product.</p> <p>19 Q. How many times did that happen?</p> <p>20 A. I'm going to say maybe 10 times a</p> <p>21 year.</p> <p>22 Q. Starting in 1976?</p> <p style="text-align: right;">Page 162</p>	<p>1 school, you knew it was going to the library,</p> <p>2 right?</p> <p>3 A. I didn't.</p> <p>4 Q. You didn't?</p> <p>5 A. No, I didn't know that was part of it.</p> <p>6 They told us later that "we keep a</p> <p>7 copy of all the papers in the library," which</p> <p>8 made sense to me.</p> <p>9 Q. Did you object to that?</p> <p>10 A. Why would I object?</p> <p>11 Q. I don't know.</p> <p>12 Did you?</p> <p>13 A. No.</p> <p>14 Q. Okay.</p> <p>15 Did your professor or your faculty</p> <p>16 advisor use your test in his classes after you</p> <p>17 graduated?</p> <p>18 A. Not with our permission.</p> <p>19 Q. So let's start with just the basic</p> <p>20 question: Did he do it -- yes or no?</p> <p>21 A. I don't know.</p> <p>22 Q. Okay.</p> <p style="text-align: right;">Page 164</p>
<p>1 A. Yes.</p> <p>2 Q. So how often when that happened would</p> <p>3 the person ultimately buy it from you?</p> <p>4 A. I just -- every time.</p> <p>5 Q. I see.</p> <p>6 Do you have any specific recollection</p> <p>7 of any person where that happened, sitting here</p> <p>8 today?</p> <p>9 A. I'm not sure how I met Len Press,</p> <p>10 but -- Dr. Press might have been one. It became</p> <p>11 a word of mouth, well-known test and that's what</p> <p>12 happened. We didn't expect it, but it did.</p> <p>13 Q. So I understand that.</p> <p>14 My question is just: Do you have,</p> <p>15 sitting here today, a specific recollection of</p> <p>16 any name of a person that went to the library,</p> <p>17 tried to get a copy, and was referred to you,</p> <p>18 and bought it?</p> <p>19 That's the question pending right now.</p> <p>20 A. I don't.</p> <p>21 Q. Okay. Fine.</p> <p>22 When you submitted the paper to the</p> <p style="text-align: right;">Page 163</p>	<p>1 You had heard that he did it? --</p> <p>2 A. I had not.</p> <p>3 Q. So why did you just say in response to</p> <p>4 my question: Not with our permission?</p> <p>5 A. What I was saying is Al King testified</p> <p>6 that he had heard that he had.</p> <p>7 Q. You never heard that?</p> <p>8 A. I never heard that.</p> <p>9 Q. Al said that you took care of it.</p> <p>10 A. He heard that they were copying it out</p> <p>11 of the library.</p> <p>12 Q. Oh, he heard that?</p> <p>13 A. And I talked to Peter Weil and did</p> <p>14 take care of it.</p> <p>15 Q. So that was the "take care of it"</p> <p>16 thing?</p> <p>17 A. That's what I -- that's -- that's</p> <p>18 exactly why I went to see Peter Weil.</p> <p>19 And he may remember, if he's still</p> <p>20 alive, this.</p> <p>21 But the point being is is that how it</p> <p>22 happened -- that's how it happened.</p> <p style="text-align: right;">Page 165</p>

<p>1 Q. Do you know if he's still alive?</p> <p>2 A. I don't. I rather doubt it, honestly.</p> <p>3 Q. He was -- he would be older?</p> <p>4 A. Well, it was -- I mean, I'm old and,</p> <p>5 you know, I was 24 back then.</p> <p>6 MR. SULLIVAN: Take a breath. You are</p> <p>7 all just -- poor Brad, okay?</p> <p>8 MR. GOETZ: Doing the best he can.</p> <p>9 MR. SULLIVAN: Doing the best he can.</p> <p>10 BY MR. GOETZ:</p> <p>11 Q. So I see, so the "you'll take care of</p> <p>12 it" exchange at the King deposition was about</p> <p>13 the librarian, Peter Weil.</p> <p>14 Is that correct?</p> <p>15 A. That's my recollection.</p> <p>16 It wasn't specifically about Peter</p> <p>17 Weil.</p> <p>18 It was about people that wanted to</p> <p>19 copy it out of the library.</p> <p>20 Q. Al had heard about that?</p> <p>21 A. Yes.</p> <p>22 Q. How did he hear about that?</p> <p style="text-align: right;">Page 166</p>	<p>1 he might have had a better relationship with</p> <p>2 Schlange, or any of the others down there.</p> <p>3 I kind of graduated and that was it.</p> <p>4 Q. So you don't really know how he heard?</p> <p>5 A. I'm not sure.</p> <p>6 Q. So he called and said: Hey, I heard</p> <p>7 people are copying it out of the library.</p> <p>8 And what did you say?</p> <p>9 A. Said: I'll go talk to them.</p> <p>10 Q. Did you say you'll take care of that?</p> <p>11 A. I said "I'll talk to them" because I</p> <p>12 knew they couldn't do that.</p> <p>13 And they were more than gracious about</p> <p>14 not letting it happen.</p> <p>15 Q. So you did talk to them?</p> <p>16 A. And I don't even know if it actually</p> <p>17 ever happened.</p> <p>18 I know that people had wanted to copy</p> <p>19 it out of the library, but I'm going to guess</p> <p>20 that might have been happened.</p> <p>21 Q. Who did you talk -- you said -- but</p> <p>22 you did talk to the library?</p> <p style="text-align: right;">Page 168</p>
<p>1 A. I have -- he testified along those</p> <p>2 lines.</p> <p>3 I don't recall how he heard about it.</p> <p>4 But I did talk to the librarian and he</p> <p>5 was more than happy to say: I'll refer him to</p> <p>6 you.</p> <p>7 Q. So forget the deposition.</p> <p>8 Take me back to at the time.</p> <p>9 What do you remember between you and</p> <p>10 Al on this topic?</p> <p>11 Did you have a conversation?</p> <p>12 Did he call you up and say: Hey,</p> <p>13 people are copying it?</p> <p>14 How did it come about?</p> <p>15 A. I think that he called me and said</p> <p>16 that he'd heard somebody was trying to copy it</p> <p>17 out of the library.</p> <p>18 Q. Did he tell you how he had heard that?</p> <p>19 A. He may have been more well connected</p> <p>20 the with the school than I was.</p> <p>21 Q. Well, then, why do you say that?</p> <p>22 A. Well he was -- he -- you know, he --</p> <p style="text-align: right;">Page 167</p>	<p>1 A. Talked to the librarian -- the head</p> <p>2 librarian.</p> <p>3 Q. Peter Weil?</p> <p>4 A. Right.</p> <p>5 I think so. I think that's his name --</p> <p>6 Q. And what did you tell him?</p> <p>7 A. -- that's either his name, or</p> <p>8 something close to that.</p> <p>9 Q. And what did you tell him?</p> <p>10 A. I said: You can't copy those.</p> <p>11 He said: I know.</p> <p>12 He said: So, should I just have them</p> <p>13 call you?</p> <p>14 I said: Yeah.</p> <p>15 Q. You gave him a phone number?</p> <p>16 A. Yes.</p> <p>17 Q. No, it was e-mail back then, right?</p> <p>18 A. No, it wasn't. There wasn't even</p> <p>19 internet.</p> <p>20 Q. Right. Okay.</p> <p>21 Now, other libraries had a copy of</p> <p>22 your paper.</p> <p style="text-align: right;">Page 169</p>

<p>1 original paper, right?</p> <p>2 A. It looks like they were, although I</p> <p>3 never sent these to any dictionary.</p> <p>4 Q. So what's your understanding of how</p> <p>5 the dictionary got copies of your cards?</p> <p>6 A. I have no idea.</p> <p>7 (Pause)</p> <p>8 Q. The dictionaries never asked you for</p> <p>9 permission to reference your test, right?</p> <p>10 A. No.</p> <p>11 Q. Or publish your cards, right?</p> <p>12 A. Never heard anything from them.</p> <p>13 Q. Okay. The first time you remember</p> <p>14 seeing the test in a medical dictionary yourself</p> <p>15 with your own two eyes was in the '80s?</p> <p>16 A. I believe so.</p> <p>17 Q. Have you or -- have you asked any of</p> <p>18 your -- anyone to look in the medical</p> <p>19 dictionaries in 1976 to see what exactly is</p> <p>20 disclosed with respect to the King-Devick Test?</p> <p>21 A. I haven't.</p> <p>22 Q. You have not. Okay. Fine.</p> <p style="text-align: right;">Page 194</p>	<p>1 this document?</p> <p>2 A. Last week.</p> <p>3 Q. How certain are you that you didn't</p> <p>4 see this during your time at the Illinois</p> <p>5 College of Optometry?</p> <p>6 A. I am certain.</p> <p>7 Q. How certain?</p> <p>8 A. Well, I just don't remember seeing it.</p> <p>9 We talked about the Vincett and the</p> <p>10 Pierce. If I had seen that, we might have</p> <p>11 talked about this, but I don't think so.</p> <p>12 Q. Is that surprising to you -- seeing</p> <p>13 that today -- that you never saw this before?</p> <p>14 A. There was no internet in 1976.</p> <p>15 Q. I know, but there was a library.</p> <p>16 A. I never saw it before.</p> <p>17 Q. I mean, did you read it last week?</p> <p>18 A. I looked at the cards and I heard what</p> <p>19 your associate was asking Al King about it.</p> <p>20 Q. Do you understand that this article</p> <p>21 uses the term "ocular motor efficiency"?</p> <p>22 A. I don't think that they invented the</p> <p style="text-align: right;">Page 196</p>
<p>1 (Pause)</p> <p>2 Q. Do you know who Luther C. Gilbert is?</p> <p>3 A. I saw his product at Al King's</p> <p>4 deposition. I didn't know anything about it</p> <p>5 before then.</p> <p>6 MR. GOETZ: I'm going to mark it here,</p> <p>7 which I think is the same, which is a nightmare</p> <p>8 for my paralegal, but I'm going to do it anyway.</p> <p>9 The Exhibit marked Devick 10 is a document</p> <p>10 bearing production Nos. NYU00471095 through</p> <p>11 1136.</p> <p>12 (Exhibit Devick 10, Document Bates</p> <p>13 stamped NYU00471095 through 471136, multipage</p> <p>14 document entitled: Functional Motor Efficiency</p> <p>15 of the Eyes and its Relation to Reading, dated</p> <p>16 1953, marked for identification)</p> <p>17 MR. GOETZ: I think this is the same</p> <p>18 thing that you saw last week. I have been told</p> <p>19 it is.</p> <p>20 So let me just ask the question.</p> <p>21 BY MR. GOETZ:</p> <p>22 Q. When was the first time you ever saw</p> <p style="text-align: right;">Page 195</p>	<p>1 term, any more than we did.</p> <p>2 Q. You don't think you invented that</p> <p>3 term, do you?</p> <p>4 A. No.</p> <p>5 Q. Do you think that you first heard that</p> <p>6 term from this reference?</p> <p>7 A. Absolutely not.</p> <p>8 Q. Why are you so certain of that?</p> <p>9 A. Because it's a commonly-used term in</p> <p>10 optometry school.</p> <p>11 Q. Do you remember where you first heard</p> <p>12 "ocular motor efficiency"?</p> <p>13 A. I would guess the first day I went to</p> <p>14 optometry school, but I'm not sure if it was the</p> <p>15 first day.</p> <p>16 Q. You agree that Digit Card 3 on page</p> <p>17 104 of Exhibit 10 is very similar to your</p> <p>18 King-Devick Test, right?</p> <p>19 A. Well, I don't.</p> <p>20 Because again, we had five specific --</p> <p>21 I thought you were going to ask about the first</p> <p>22 two cards, because one, two, three, four, five,</p> <p style="text-align: right;">Page 197</p>

<p>1 do it accurately.</p> <p>2 That's your point, right?</p> <p>3 A. Well, my point is that there is a lot</p> <p>4 of other reasons as well.</p> <p>5 Q. But isn't the point you just made that</p> <p>6 you may not even be able to do it because the</p> <p>7 scale might be off?</p> <p>8 Wasn't that the point you just made?</p> <p>9 A. Said that.</p> <p>10 My point was that it wouldn't matter,</p> <p>11 because there are so many other things.</p> <p>12 Q. How long did it take you to decide</p> <p>13 that the King-Devick test is better than the</p> <p>14 Gilbert test?</p> <p>15 It sounds like, basically,</p> <p>16 instantaneously, but I would like to hear what</p> <p>17 your answer is.</p> <p>18 A. Instantaneously.</p> <p>19 Q. Okay. Fair enough.</p> <p>20 MR. GOETZ: Okay, I'm going to mark a</p> <p>21 document as Devick 11, which is a document in</p> <p>22 this case.</p> <p style="text-align: right;">Page 210</p>	<p>1 it's better or not?</p> <p>2 THE WITNESS: As you pointed out, I</p> <p>3 haven't done any tests.</p> <p>4 MR. GOETZ: But it's different.</p> <p>5 That's your point?</p> <p>6 THE WITNESS: Yes.</p> <p>7 MR. GOETZ: Okay.</p> <p>8 BY MR. GOETZ:</p> <p>9 Q. So Devick 11 is a document bearing</p> <p>10 production numbers NYU0046922 through 251.</p> <p>11 This is -- you recognize this, right?</p> <p>12 A. Just from Dr. King's deposition.</p> <p>13 Q. So you hadn't seen this before the</p> <p>14 deposition last week?</p> <p>15 A. No.</p> <p>16 Q. So how did you see the Vincett test?</p> <p>17 I don't know if I'm saying that right.</p> <p>18 A. No, I think that is right.</p> <p>19 Actually, I had seen it in class. And</p> <p>20 it was -- the version that I -- the only version</p> <p>21 I saw was letters were equally spaced on lines,</p> <p>22 and that's in here.</p> <p style="text-align: right;">Page 212</p>
<p>1 (Exhibit Devick 11, Document Bates</p> <p>2 stamped NYU00469222 through 469251, multipage</p> <p>3 document entitled: Optometric Perceptual Testing</p> <p>4 and Training Manual, dated 1975, marked for</p> <p>5 identification)</p> <p>6 THE WITNESS: Would you mind me</p> <p>7 correcting one thing? --</p> <p>8 MR. GOETZ: Of course. Go ahead.</p> <p>9 THE WITNESS: -- different than the</p> <p>10 King-Devick Test.</p> <p>11 I don't know what the studies show in</p> <p>12 the Gilbert. It's certainly not like the</p> <p>13 King-Devick Test. I didn't want to -- just</p> <p>14 clarify that.</p> <p>15 MR. GOETZ: I don't understand what</p> <p>16 your point is. Help me understand. Your point</p> <p>17 is --</p> <p>18 MR. SULLIVAN: You said: Better.</p> <p>19 THE WITNESS: You said: Better.</p> <p>20 MR. GOETZ: Okay. Different?</p> <p>21 THE WITNESS: Right.</p> <p>22 MR. GOETZ: You don't know whether</p> <p style="text-align: right;">Page 211</p>	<p>1 Q. You see that here on, like, what? --</p> <p>2 A. And I described it in the paper as a</p> <p>3 test of equidistant letters, not numbers.</p> <p>4 Q. You see that there is numbers too,</p> <p>5 though, now?</p> <p>6 A. I didn't have any idea.</p> <p>7 But it wouldn't matter anyway because,</p> <p>8 again, relative to the habituation and</p> <p>9 participation, they are all equally spaced.</p> <p>10 Q. You see there is numbers in here now,</p> <p>11 though, right?</p> <p>12 A. I saw that when I -- when I had the --</p> <p>13 was at the Al King deposition.</p> <p>14 The only version I had ever seen was</p> <p>15 the one with letters. And I guess that's</p> <p>16 missing from this one now, but it's not in the</p> <p>17 copy I got from Al King.</p> <p>18 Q. No, there is letters. Take a look at</p> <p>19 page 247.</p> <p>20 A. Oh, well, they were together in front</p> <p>21 in the last one, I think -- but, whatever.</p> <p>22 Yeah -- the only one that I had ever</p> <p style="text-align: right;">Page 213</p>

<p>1 seen was the letters and equidistant.</p> <p>2 But it wouldn't matter anyway because,</p> <p>3 again, these are equally-spaced numbers.</p> <p>4 Q. So let me just make sure I have it</p> <p>5 right.</p> <p>6 So you saw the Vincett test when you</p> <p>7 were in school before you did your paper.</p> <p>8 Fair?</p> <p>9 A. I did.</p> <p>10 Q. And you saw it in a class, you think?</p> <p>11 A. I don't recall.</p> <p>12 Q. But you didn't see this particular</p> <p>13 paper -- Exhibit 11.</p> <p>14 You don't remember seeing that, right?</p> <p>15 A. No, and it's possible I never saw the</p> <p>16 Vincett test.</p> <p>17 It's just that I heard it was</p> <p>18 equally-spaced letters, which is how I describe</p> <p>19 it in our paper.</p> <p>20 Q. Okay.</p> <p>21 A. It not -- it's possible that I never</p> <p>22 even saw it and just heard that -- because that</p> <p style="text-align: right;">Page 214</p>	<p>1 which is all I ever saw -- would be one thing.</p> <p>2 The other is that they are equally</p> <p>3 spaced. And, in my opinion, it is way too busy.</p> <p>4 But at any rate, we mentioned it in</p> <p>5 the paper, and that's what it is.</p> <p>6 (Pause)</p> <p>7 Q. When you did your paper, why did you</p> <p>8 actually decide to do a test on the King-Devick</p> <p>9 Test and the Pierce test?</p> <p>10 A. Well, because we knew about the Pierce</p> <p>11 test. I actually liked listening to Jeff</p> <p>12 Pierce. And we were hoping that he'd look at</p> <p>13 our results, if ours came out better. We</p> <p>14 thought that our concept was much better -- and,</p> <p>15 in fact, it was.</p> <p>16 Q. I mean, didn't you choose Pierce over</p> <p>17 Vincett because you were closer to Pierce than</p> <p>18 Vincett?</p> <p>19 A. No. I didn't. I didn't have a</p> <p>20 relationship with any of them.</p> <p>21 I thought the Vincett test was not a</p> <p>22 test that we -- we dismissed it out of the box,</p> <p style="text-align: right;">Page 216</p>
<p>1 is so profoundly not what we were doing, that</p> <p>2 we'd eliminate that as a possible alternative to</p> <p>3 our test.</p> <p>4 Q. Okay. So you just don't remember one</p> <p>5 way or another how you first came about the</p> <p>6 Vincett test.</p> <p>7 Is that fair?</p> <p>8 A. I am sure that I heard about it in</p> <p>9 optometry school.</p> <p>10 But I don't know that I ever</p> <p>11 physically held one, or looked at it, other than</p> <p>12 in a book.</p> <p>13 (Pause)</p> <p>14 Q. What are the differences between the</p> <p>15 Vincett and a King-Devick Test?</p> <p>16 A. Well, the main difference is back to</p> <p>17 what we always talk about: The habituation and</p> <p>18 the anticipation; not to mention the fact that</p> <p>19 letters are learned later and not as -- there is</p> <p>20 not as much automaticity in letters, especially</p> <p>21 for younger kids.</p> <p>22 So again, using letters at the time --</p> <p style="text-align: right;">Page 215</p>	<p>1 if nothing more for it than the fact that when</p> <p>2 you give a first grader letters to read, they</p> <p>3 don't know them.</p> <p>4 Q. So the Pierce test is better than</p> <p>5 Vincett?</p> <p>6 A. I don't know that it's better because</p> <p>7 it doesn't have any -- it's only got a 10-inch</p> <p>8 saccade distance. I don't know if it's better.</p> <p>9 But again, this one, we couldn't even</p> <p>10 administer to first graders.</p> <p>11 Q. Is it customary to test two tests</p> <p>12 together? -- in this field?</p> <p>13 A. I think that when we have done</p> <p>14 concussion testing, a lot of time they compared</p> <p>15 one test to the other -- not necessarily testing</p> <p>16 the same thing, but -- and I think that's what</p> <p>17 we did in this case, because I don't think</p> <p>18 Pierce tested reading-related saccades, because</p> <p>19 of -- just too far apart.</p> <p>20 Q. Did you personally conduct the tests</p> <p>21 on the students for your paper?</p> <p>22 A. Yes.</p> <p style="text-align: right;">Page 217</p>

<p>1 '77, '78, right?</p> <p>2 A. This was updated with the NYSOA</p> <p>3 results.</p> <p>4 Q. So what data was it originally when</p> <p>5 you were sending it out in 1977 -- '76, '77,</p> <p>6 '78?</p> <p>7 A. As described in this published paper,</p> <p>8 similar -- but that's listed in our paper.</p> <p>9 Q. So just different data?</p> <p>10 A. Very similar, but, yes, different.</p> <p>11 Q. Okay.</p> <p>12 (Pause)</p> <p>13 Q. So that data is from this paper that</p> <p>14 was by Lieberman, Cohen, and Rubin.</p> <p>15 Is that right?</p> <p>16 A. Yes.</p> <p>17 Q. Do you know those gentlemen?</p> <p>18 A. I have met at least two of them.</p> <p>19 Q. When?</p> <p>20 A. In the last 10 years.</p> <p>21 Q. In what context?</p> <p>22 A. They are still professors at SUNY --</p> <p style="text-align: right;">Page 250</p>	<p>1 cards.</p> <p>2 Q. Are you saying that they used Exhibit</p> <p>3 13?</p> <p>4 A. Exhibit 13.</p> <p>5 You mean the Bernell one?</p> <p>6 No, that didn't exist yet.</p> <p>7 Q. Okay, so which ones did they use?</p> <p>8 A. They used the ones that I used to mail</p> <p>9 out.</p> <p>10 Q. Okay, so you sold them the test?</p> <p>11 A. I'm not sure that I did.</p> <p>12 Q. You may have donated them?</p> <p>13 A. I don't know that I -- I honestly</p> <p>14 never confirmed with them where they got it.</p> <p>15 Most likely, they got it from me</p> <p>16 selling it to them.</p> <p>17 But again, I guess it's possible they</p> <p>18 could have made a copy somewhere, but I don't</p> <p>19 know.</p> <p>20 Q. You just don't know sitting here</p> <p>21 today?</p> <p>22 A. I don't know.</p> <p style="text-align: right;">Page 252</p>
<p>1 one of them was. Cohen was still professor at</p> <p>2 SUNY.</p> <p>3 MR. GOETZ: I'm going to hand to you a</p> <p>4 document that I marked as Exhibit 14, bearing</p> <p>5 production Nos. KDT0032335 through 345.</p> <p>6 (Exhibit Devick 14, Document Bates</p> <p>7 stamped KDT0032355 through 32345, multipage</p> <p>8 document bearing heading on first page: Exhibit</p> <p>9 6, marked for identification)</p> <p>10 BY MR. GOETZ:</p> <p>11 Q. That's the paper, right?</p> <p>12 A. Did you ask me a question?</p> <p>13 Q. Yeah.</p> <p>14 That's the paper that generated -- or</p> <p>15 that reported the data that's reflected in the</p> <p>16 last page of Exhibit 13.</p> <p>17 Is that correct?</p> <p>18 A. I believe so.</p> <p>19 Q. What King-Devick cards were used in</p> <p>20 this test?</p> <p>21 A. The ones that we've always used. We</p> <p>22 only had one set back then of the physical test</p> <p style="text-align: right;">Page 251</p>	<p>1 Q. Okay.</p> <p>2 You never talked with Lieberman or</p> <p>3 Cohen or Rubin about their recollection of how</p> <p>4 they got the test?</p> <p>5 A. I never did.</p> <p>6 Q. I guess it's not really surprising to</p> <p>7 you that they got the test.</p> <p>8 It was pretty widespread, you know, in</p> <p>9 terms of the community by this time -- in</p> <p>10 1978 -- right?</p> <p>11 A. Yes, people were interested in it, for</p> <p>12 sure, from the very first.</p> <p>13 Q. Have you ever read this paper?</p> <p>14 A. Yes, I've read it.</p> <p>15 This paper?</p> <p>16 Q. Yeah.</p> <p>17 A. Sure.</p> <p>18 Q. When is the last time you read this</p> <p>19 paper?</p> <p>20 A. It's been a while.</p> <p>21 Q. How long?</p> <p>22 Did you read it yesterday?</p> <p style="text-align: right;">Page 253</p>

<p>1 A. No.</p> <p>2 Q. Okay.</p> <p>3 You see how they say that: The</p> <p>4 King-Devick Test is a modification of the Pierce</p> <p>5 Saccade Test?</p> <p>6 Page 340 in the upper left-hand</p> <p>7 corner?</p> <p>8 (Pause)</p> <p>9 A. Yes.</p> <p>10 Q. You disagree with that?</p> <p>11 A. As we discussed before, there are</p> <p>12 certain aspects of it that are modified -- but</p> <p>13 overall, it's a different test.</p> <p>14 Q. Then they also say this test -- the</p> <p>15 King-Devick Test is -- quote: "Very similar --</p> <p>16 I'm sorry.</p> <p>17 Withdrawn. Strike that. Try it</p> <p>18 again.</p> <p>19 In the middle column at the bottom</p> <p>20 here, they say -- describing the test, they say:</p> <p>21 Which is very similar to the K-D Test was first</p> <p>22 described by Gilbert.</p> <p style="text-align: right;">Page 254</p>	<p>1 Q. What's the most number of tests that</p> <p>2 you shipped out in '77, '78, '79 -- '76, '77,</p> <p>3 '78?</p> <p>4 A. I don't recall sending more than one</p> <p>5 to one party.</p> <p>6 Q. One per unit.</p> <p>7 You don't recall boxing up a bunch and</p> <p>8 sending a whole box out?</p> <p>9 A. I don't recall that.</p> <p>10 Q. So the use of your test, as I think</p> <p>11 you testified, by 1979 is pretty widespread.</p> <p>12 Is that fair?</p> <p>13 A. I don't know if it was widespread, but</p> <p>14 it was well known.</p> <p>15 Q. Okay.</p> <p>16 MR. GOETZ: I have the book here,</p> <p>17 which I can mark as an exhibit.</p> <p>18 But do you want to mark it?</p> <p>19 MR. SULLIVAN: Do you want to mark the</p> <p>20 whole book?</p> <p>21 MR. GOETZ: I don't care. I just want</p> <p>22 to ask some questions about it.</p> <p style="text-align: right;">Page 256</p>
<p>1 Do you see those words?</p> <p>2 A. I do.</p> <p>3 Q. You said you disagree with the</p> <p>4 similarity -- comparison between K-D test and</p> <p>5 Gilbert.</p> <p>6 Is that right?</p> <p>7 A. The first time I ever saw Gilbert was</p> <p>8 at Al Kings deposition. So -- and I've</p> <p>9 described how I don't agree that it's anything</p> <p>10 like King-Devick.</p> <p>11 Q. When you first saw this paper, you</p> <p>12 didn't read that and go look at Gilbert?</p> <p>13 A. I didn't.</p> <p>14 Q. Okay. I mean, how many tests do you</p> <p>15 think it took them to collect data on 1,200</p> <p>16 students?</p> <p>17 Do you have any sense for that?</p> <p>18 A. Well, I'm guessing they weren't all in</p> <p>19 the same location, so they probably went from</p> <p>20 school to school t school with a few tests.</p> <p>21 Q. So, like, five or ten?</p> <p>22 A. I don't even know how to guess.</p> <p style="text-align: right;">Page 255</p>	<p>1 MR. SULLIVAN: Mark it. We can make</p> <p>2 it an excerpt after the fact.</p> <p>3 MR. GOETZ: That's fine.</p> <p>4 So Devick Exhibit 15 is a book here.</p> <p>5 (Exhibit Devick 15, Book entitled:</p> <p>6 Binocular Anomalies Procedure for Vision</p> <p>7 Therapy, by John R. Griffin, O.D., Second</p> <p>8 Edition (no Bates Nos.), marked for</p> <p>9 identification)</p> <p>10 BY MR. GOETZ:</p> <p>11 Q. Do you recognize that book?</p> <p>12 A. No.</p> <p>13 Q. You don't recall ever seeing that</p> <p>14 book?</p> <p>15 A. I don't.</p> <p>16 Q. That's okay.</p> <p>17 So I've put some tabs on -- there is a</p> <p>18 little description of the King-Devick test in</p> <p>19 there, and jus flip to the tab -- the purple</p> <p>20 tab.</p> <p>21 Let's me know if you recognize that</p> <p>22 reference to your test.</p> <p style="text-align: right;">Page 257</p>

<p>1 Q. Oh, I see. Those numbers look like 2 they came out of your paper. I mean, we could 3 check. 4 A. You got to check. 5 Q. Okay. Do you know either of the 6 authors on this paper? 7 A. No. 8 Q. Do you know the authors on Exhibit 18, 9 which is the paper that cited to this Bond 10 paper? 11 A. Eighteen. Oh, I don't know them, but 12 I've seen the article before. 13 Q. But you never met them in person? 14 A. I never met them, not that I'm aware 15 of. 16 (Pause) 17 Q. So it's fair to say that we've seen 18 references, you know, here that there is a lot 19 of people that had access to your senior paper 20 after you finished it. 21 Is that fair? 22 A. I don't know that there is a lot.</p> <p style="text-align: right;">Page 294</p>	<p>1 Fair? 2 A. I don't know whether I shipped them to 3 them, or they got them to -- somehow illegally, 4 but that would be the two options. 5 Q. During the course of your work on your 6 senior paper, did you actually look at previous 7 senior papers at your library? 8 A. I don't think so. 9 Q. You just don't remember? 10 A. I don't think I did. 11 Q. But you are uncertain. 12 Why? 13 A. I am uncertain because it was 44 years 14 ago. 15 Q. Because you don't remember. 16 Is that right? 17 A. It doesn't sound like something I'd 18 do -- but, no. 19 Q. How many original copies of your paper 20 were there? 21 Just one? 22 A. Well, I have one, and Al had one, and</p> <p style="text-align: right;">Page 296</p>
<p>1 We've seen or three or four. 2 Q. They are all referencing, you know, 3 your senior paper. One of them even says it's 4 available at the library. 5 You don't know how any of them got it, 6 though. 7 Fair? 8 A. Well, perhaps they meant it was 9 available to read at the library -- and, in 10 fact, it was. 11 Q. Yeah, but you don't know how they got 12 it, or what they did, or -- 13 A. Well -- 14 Q. -- is that -- 15 A. -- well, unless I made it and shipped 16 it to them. That would be the likely way they 17 would get it. 18 Q. Okay. Understand. 19 But you are just not -- you just don't 20 know one way or the other whether you did that 21 with respect to any of these papers that are 22 referencing your test right now.</p> <p style="text-align: right;">Page 295</p>	<p>1 we left one with -- I don't know if Dr. Schlange 2 kept one or not. So we -- there was two, at 3 least two. 4 Q. At least two? 5 A. Well, we don't know whether he copied 6 it or not. I'm guessing he did because it ended 7 up in the library, and we didn't know that was 8 going to happen. 9 Q. And the products you were shipping in 10 '76, and '77, and '78 -- did those products 11 reference your senior paper at all? 12 Or no? 13 A. No. 14 Q. Just the test? 15 A. Just the test. 16 Q. In 1976, was the public allowed to go 17 into the library and view senior papers? 18 Or do you know? 19 A. I think so, but you probably have to 20 have some kind of credentials to get into that 21 library. 22 Q. I see.</p> <p style="text-align: right;">Page 297</p>

<p>1 But your view is that they weren't</p> <p>2 allowed -- people weren't allowed to make</p> <p>3 copies.</p> <p>4 Is that right?</p> <p>5 A. That's right.</p> <p>6 Q. And the librarian told you that at the</p> <p>7 time.</p> <p>8 Is that right?</p> <p>9 A. I told him that if somebody wanted a</p> <p>10 copy, that he'd refer them to me, which he did</p> <p>11 quite often.</p> <p>12 (Pause)</p> <p>13 Q. So there are originally, you said, at</p> <p>14 least two copies of your senior paper.</p> <p>15 But there might have been three?</p> <p>16 A. Well, we each got a copy. Al King and</p> <p>17 I each got a copy. And evidently, Dr. Schlange</p> <p>18 kept a copy, too.</p> <p>19 Q. Was any photocopy made originally?</p> <p>20 In other words, did you have one</p> <p>21 master, then you made a copy and gave it to</p> <p>22 King, and then you made another copy and gave it</p> <p style="text-align: right;">Page 298</p>	<p>1 Q. So let's talk about that.</p> <p>2 MR. GOETZ: So Devick Exhibit 20 is a</p> <p>3 document bearing production No. NYU00469252.</p> <p>4 (Exhibit Devick 20, Document Bates</p> <p>5 stamped NYU00469252, single-page document</p> <p>6 bearing heading: Details for The proposed</p> <p>7 King-Devick saccade test and its relation to the</p> <p>8 Pierce saccade test and reading levels, marked</p> <p>9 for identification)</p> <p>10 BY MR. GOETZ:</p> <p>11 Q. Do you recognize that document, sir?</p> <p>12 A. Let me take a look.</p> <p>13 (Pause)</p> <p>14 A. Yeah -- it's nothing I've ever seen</p> <p>15 before.</p> <p>16 Q. Okay. You see how it's entitled --</p> <p>17 that's the title of your senior paper, right?</p> <p>18 A. Yes.</p> <p>19 Q. And it says -- it's a -- Material Type</p> <p>20 is a Senior Project.</p> <p>21 You see that? -- in the column of the</p> <p>22 chart at the bottom of the document?</p> <p style="text-align: right;">Page 300</p>
<p>1 to the professor?</p> <p>2 Or you don't remember?</p> <p>3 A. Well, I'm sure we didn't re-type it</p> <p>4 twice. So when it was done, we more than likely</p> <p>5 made a copy of it for each of us.</p> <p>6 (Pause)</p> <p>7 Q. But you don't remember whether it was</p> <p>8 two or three?</p> <p>9 A. I know it was at least two.</p> <p>10 Q. So you don't remember whether it was</p> <p>11 more than two, I guess.</p> <p>12 Is that right?</p> <p>13 A. Any more than two weren't authorized</p> <p>14 by us.</p> <p>15 Q. Okay. But come to find out that at</p> <p>16 least four were made, right?</p> <p>17 A. Unless I shipped them to them.</p> <p>18 Q. Well, I mean, the library has four --</p> <p>19 or at least they had four a few months ago,</p> <p>20 right?</p> <p>21 A. Those were copies of the whole</p> <p>22 research paper.</p> <p style="text-align: right;">Page 299</p>	<p>1 A. Oh, yeah.</p> <p>2 Q. You see that?</p> <p>3 A. Yes.</p> <p>4 Q. Different bar codes for each one.</p> <p>5 There is four copies.</p> <p>6 Do you see that?</p> <p>7 A. I do, but it doesn't say when these</p> <p>8 copies were made.</p> <p>9 Q. That was my next question.</p> <p>10 What do you know about when those</p> <p>11 copies were made?</p> <p>12 Sounds like nothing?</p> <p>13 A. I've never seen this before.</p> <p>14 Q. There were four copies in the library</p> <p>15 just a few months ago, correct?</p> <p>16 A. They sent me four copies, so, yes.</p> <p>17 Q. What do you know about when those</p> <p>18 copies were made, if anything?</p> <p>19 A. Nothing.</p> <p>20 (Pause)</p> <p>21 Q. You see where it says: Publication</p> <p>22 Date: 1976?</p> <p style="text-align: right;">Page 301</p>

<p>1 Do you see that?</p> <p>2 A. Yes.</p> <p>3 Q. I mean, that's consistent with your</p> <p>4 testimony today of you selling the product in</p> <p>5 1976, right?</p> <p>6 A. Well, up until a while ago --</p> <p>7 recently -- I didn't know that publication date</p> <p>8 was a legal term. So we started selling those</p> <p>9 in 1976.</p> <p>10 Q. That was a publication, right?</p> <p>11 A. Well, I wasn't aware of that, not</p> <p>12 being a lawyer as we've discussed. So I thought</p> <p>13 we were making up copies of our copywritten</p> <p>14 product and selling them.</p> <p>15 I thought the publication date, when</p> <p>16 asked, to me, was the date when the</p> <p>17 peer-reviewed paper was published --</p> <p>18 Q. I see.</p> <p>19 A. -- which was 1983.</p> <p>20 But that's just I was ignorant of</p> <p>21 legal terminology for "published date."</p> <p>22 Q. When you say the peer-reviewed paper</p> <p style="text-align: right;">Page 302</p>	<p>1 e-mail chain, top e-mail From: Valarie Conrad,</p> <p>2 To: Christine Weber and others, Subject: RE:</p> <p>3 Agenda Item King Devick books, Sent: April 24,</p> <p>4 2018, marked for identification)</p> <p>5 BY MR. GOETZ:</p> <p>6 Q. Have you seen that before, sir?</p> <p>7 A. I haven't.</p> <p>8 Q. It's an e-mail string about your --</p> <p>9 about your papers.</p> <p>10 Second page in the middle, there is an</p> <p>11 e-mail from Stephanie Messner.</p> <p>12 Do you recognize her as being Len</p> <p>13 Messner's wife?</p> <p>14 A. Well, his wife is named Stephanie, so,</p> <p>15 yeah.</p> <p>16 Q. Why would she be involved in a</p> <p>17 discussion about your papers at the library?</p> <p>18 Do you have any idea?</p> <p>19 A. She's the dean.</p> <p>20 Q. Dean of what?</p> <p>21 A. The school.</p> <p>22 Q. I see.</p> <p style="text-align: right;">Page 304</p>
<p>1 was published, what are you talking about?</p> <p>2 A. This one, the first paper.</p> <p>3 Q. Oh, the NYSOA paper?</p> <p>4 A. Right.</p> <p>5 Q. Gotcha.</p> <p>6 Do you know Stephanie Messner?</p> <p>7 A. Yes.</p> <p>8 Q. Is that Len Messner's daughter?</p> <p>9 A. It's his wife.</p> <p>10 Q. Is she -- she is -- she has a stake in</p> <p>11 your company?</p> <p>12 A. She's the dean. And between the two</p> <p>13 of them, they have a very small amount of stock.</p> <p>14 Q. Do you know what "a very small amount"</p> <p>15 is in this context?</p> <p>16 A. I don't know specifically, but not a</p> <p>17 large dollar amount.</p> <p>18 MR. GOETZ: I'm going to hand to you a</p> <p>19 document, Devick 21, which is a document bearing</p> <p>20 production Nos. ICO KDTTest 000009 through 11.</p> <p>21 (Exhibit Devick 21, Document Bates</p> <p>22 stamped ICO KDTTest 000009 through 11, three-page</p> <p style="text-align: right;">Page 303</p>	<p>1 Did you ever talk with Ms. Messner</p> <p>2 about your papers?</p> <p>3 A. No, not that I recall. I mean, she</p> <p>4 knew the origin of the test, but --</p> <p>5 (Pause)</p> <p>6 A. It says it was their policy not to</p> <p>7 ever lend them out or photocopy them.</p> <p>8 Q. On page 2 at the bottom, there is a</p> <p>9 sentence that says -- well, from Weber,</p> <p>10 Christine.</p> <p>11 Do you know who that is?</p> <p>12 A. No -- actually, she might be a</p> <p>13 librarian now.</p> <p>14 Q. Did you ever talk with her?</p> <p>15 A. Someone -- and it might have been</p> <p>16 her -- called me to say they are going to send</p> <p>17 my tests back to me.</p> <p>18 Q. She says at the bottom here: In the</p> <p>19 meantime, Dr. Devick called me and asked me not</p> <p>20 to lend them.</p> <p>21 Do you see that?</p> <p>22 A. I -- yes, I do.</p> <p style="text-align: right;">Page 305</p>

<p>1 And it says -- and they -- the policy</p> <p>2 in the prior sentence is they never lend them</p> <p>3 out or photocopy them.</p> <p>4 Q. Did you call her and tell her not to</p> <p>5 lend them?</p> <p>6 A. No, what I did was I called someone at</p> <p>7 the library -- and I can't identify for sure --</p> <p>8 and I said: Why don't you just send the copies</p> <p>9 back?</p> <p>10 Q. Did you tell the person not to lend</p> <p>11 them?</p> <p>12 A. Their policy was not to lend them.</p> <p>13 Q. Did you tell the person not to lend</p> <p>14 them?</p> <p>15 A. Not that I recall.</p> <p>16 Q. Does Dr. Schlange have his own</p> <p>17 personal copy?</p> <p>18 Do you know?</p> <p>19 A. I don't.</p> <p>20 Q. Did he keep two copies?</p> <p>21 Do you know?</p> <p>22 A. I don't know.</p> <p style="text-align: right;">Page 306</p>	<p>1 A. I'm not sure.</p> <p>2 Q. What was your -- well, who decided to</p> <p>3 file the copyright application?</p> <p>4 A. When Bernell and King-Devick were</p> <p>5 negotiating, about to be distributed, that's</p> <p>6 when someone on our end suggested we file the</p> <p>7 registration, and not just have the copyright</p> <p>8 language on.</p> <p>9 Q. Do you remember who?</p> <p>10 A. I don't.</p> <p>11 Q. Who was your lawyer that you used to</p> <p>12 file the copyright application?</p> <p>13 A. We used a local guy named Herbert</p> <p>14 Bell, I believe.</p> <p>15 Q. Was this the same intellectual</p> <p>16 property attorney that you mentioned earlier</p> <p>17 today?</p> <p>18 A. No.</p> <p>19 Q. Who was that?</p> <p>20 A. This was a friend of my uncle's</p> <p>21 back -- early days -- in -- I don't remember his</p> <p>22 name.</p> <p style="text-align: right;">Page 308</p>
<p>1 But it says on the next paragraph he</p> <p>2 has his own personal copy.</p> <p>3 Q. You don't have any reason to doubt</p> <p>4 that, do you?</p> <p>5 A. I haven't talked to him for year --</p> <p>6 decades.</p> <p>7 (Pause)</p> <p>8 Q. So as of right now, though, you don't</p> <p>9 care whether they are in the library or not.</p> <p>10 Was that what your testimony was</p> <p>11 earlier?</p> <p>12 A. Well, if they are being copied as</p> <p>13 certainly -- even if illegally -- I certainly</p> <p>14 don't want them in the library.</p> <p>15 (Pause)</p> <p>16 Q. Okay. There finally came a time when</p> <p>17 you decided to file for a copyright application</p> <p>18 on your paper, right?</p> <p>19 A. The copyright registration was filed</p> <p>20 in 1983.</p> <p>21 Q. Why did you file on the whole paper</p> <p>22 and not just the test?</p> <p style="text-align: right;">Page 307</p>	<p>1 But Herbert bell was a local lawyer.</p> <p>2 Q. How did you get introduced to him?</p> <p>3 A. It was just local. He wasn't an</p> <p>4 expert perhaps, but he was a nice guy.</p> <p>5 Q. "Wasn't an expert perhaps" -- what do</p> <p>6 you mean by that?</p> <p>7 A. Well, he didn't specifically practice</p> <p>8 copyright law. He was a general lawyer.</p> <p>9 And I guess I shouldn't have said</p> <p>10 "expert."</p> <p>11 He wasn't a specialist is what I</p> <p>12 should have said. I don't think he was.</p> <p>13 Q. It sounds like you are worried he did</p> <p>14 something wrong.</p> <p>15 Do you think he did something wrong?</p> <p>16 A. I don't think he did anything wrong,</p> <p>17 no.</p> <p>18 Q. How did you come to meet Mr. Bell?</p> <p>19 A. I don't recall. He was -- he lived in</p> <p>20 Downers Grove. My practice has been in Downers</p> <p>21 Grove.</p> <p>22 Q. You just said a word that the court</p> <p style="text-align: right;">Page 309</p>

<p>1 reporter didn't get. 2 Was that a town? 3 A. Oh, yeah -- my practice was in Downers 4 Grove, Illinois. And that's where Mr. Bell 5 or -- I think Bell -- had his practice. 6 Q. Did you ever use Mr. Bell for anything 7 else? 8 A. Not that I remember. 9 Q. Okay. So tell me what you can 10 remember about the application process in 1983. 11 What did you do? 12 A. We had him use the language that we -- 13 we requested the language that we had used that 14 Bernell put in part of his -- he handled the 15 contract for us, too -- which is one of these 16 exhibits. 17 And that's all I remember, other than 18 the copyright was registered then, too. 19 Q. So Bell worked on the contract as 20 well? 21 A. Yes. 22 Q. Then he filed the 1983 registration.</p> <p style="text-align: right;">Page 310</p>	<p>1 2 3 4 (Exhibit Devick 22, Document Bates 5 stamped KDT0031757 through 31802, multipage 6 document entitled: King-Devick Saccade Test in 7 the Copyright Office of the United States, 8 marked for identification) 9 BY MR. GOETZ: 10 Q. You recognize Exhibit 22? 11 A. It looks like the original paper 12 without the Pierce test in it. 13 Q. Right. There is some other missing 14 things, too. 15 Let me just ask this: How did the 16 lawyer Bell get a copy of your paper? 17 Did you give him a full copy of the 18 paper? 19 A. I gave him my copy. 20 Q. You just gave him your copy of the 21 senior paper? 22 A. I gave him my copy, yes.</p> <p style="text-align: right;">Page 312</p>
<p>1 Is that correct? 2 A. Yes. 3 Q. Did he do any other work for you that 4 can recall sitting here today? 5 A. I can't recall any other work today. 6 Q. Why didn't you file your copyright 7 registration before the Bernell agreement? 8 A. I was told -- I understood that it 9 wasn't necessary; so long as we had the language 10 on it, that we were fine without registering it. 11 Q. Did Bell tell you that? 12 Or that you heard from your uncle's 13 friend? 14 A. From the original lawyer. 15 Q. Who is that? 16 Your uncle's friend? 17 A. Yeah. 18 Q. You don't remember his name? 19 A. I don't. 20 MR. GOETZ: Mark as Exhibit 22 a 21 document bearing production Nos. KDT0031757 22 through 802.</p> <p style="text-align: right;">Page 311</p>	<p>1 Q. Was it bound -- that copy of your 2 senior paper? 3 A. The one that -- yeah, this is similar 4 to what Al King had. That was the original 5 paper. That's how we got all this stuff. 6 And it might have come from Al, too, 7 because he was in on this, but I think it was 8 mine. 9 Q. Okay. How was it bound? -- just so 10 the record is clear. 11 A. With a -- what was used for notebook 12 covers back then. It wasn't -- 13 Q. Okay. Then do you agree that Exhibit 14 22 looks like a photocopy of some of the pages, 15 given how some of the pages are sort of askew? 16 A. Could be. 17 Q. What's your understanding of what Mr. 18 Bell did with the paper? 19 A. I think he filed -- registered a 20 copyright for it and the test along with it. 21 Q. What's your understanding of how he 22 created Exhibit 22?</p> <p style="text-align: right;">Page 313</p>

<p>1 A. I don't have -- I don't know.</p> <p>2 Q. You have no idea, okay.</p> <p>3 A. Well, he somehow put together the</p> <p>4 product -- the paper and test that I gave him.</p> <p>5 Q. I mean, it looks like he decided to</p> <p>6 take some information out, or not copy some</p> <p>7 information, right?</p> <p>8 A. I haven't examined it closely enough</p> <p>9 to see what we may or may not have taken out.</p> <p>10 It doesn't have the abstract or the</p> <p>11 title page, perhaps. Doesn't have the -- yeah,</p> <p>12 it doesn't have the Pierce paper in there. So,</p> <p>13 there were some decisions made as to leave those</p> <p>14 out, evidently.</p> <p>15 Q. Who made those decisions?</p> <p>16 A. Al King and I and this lawyer were</p> <p>17 involved in giving him the information to file,</p> <p>18 so a combination of one of the three of us.</p> <p>19 Q. Do you recall sitting here today whose</p> <p>20 idea it was to not submit the Pierce test to the</p> <p>21 Copyright Office?</p> <p>22 A. I don't.</p> <p style="text-align: right;">Page 314</p>	<p>1 THE WITNESS: Can I take a break at</p> <p>2 some point pretty soon? --</p> <p>3 MR. GOETZ: We can take a break right</p> <p>4 now.</p> <p>5 (Pause)</p> <p>6 THE VIDEOGRAPHER: We're going off the</p> <p>7 record at 2:37 p.m.</p> <p>8 (Recess from 2:37 p.m. to 2:52 p.m.)</p> <p>9 THE VIDEOGRAPHER: We are back on the</p> <p>10 record at 2:52 p.m.</p> <p>11 BY MR. GOETZ:</p> <p>12 Q. I want to go back to the Bernell</p> <p>13 agreement for one second?</p> <p>14 MR. GOETZ: And I'm going to hand to</p> <p>15 you a document marked as Devick 23, bearing</p> <p>16 production Nos. KDT0154890 and 891.</p> <p>17 (Exhibit Devick 23, Document Bates</p> <p>18 stamped KDT0154890 through 154891, two-page</p> <p>19 letter from Richard W. Paulen to Jeffrey S.</p> <p>20 Beardsley, dated March 2, 1983, marked for</p> <p>21 identification)</p> <p>22 BY MR. GOETZ:</p> <p style="text-align: right;">Page 316</p>
<p>1 But I think that it's a copyrighted</p> <p>2 test. So it probably -- you know, maybe that</p> <p>3 had something standards with it.</p> <p>4 I really don't know.</p> <p>5 Q. You are not a lawyer, I thought.</p> <p>6 A. I'm not a lawyer.</p> <p>7 Q. Okay. So sitting here --</p> <p>8 A. I wish I was, though.</p> <p>9 Q. No, you don't.</p> <p>10 Sitting here today, you don't recall</p> <p>11 who made the decision not to include the Pierce</p> <p>12 test in your deposit.</p> <p>13 Is that correct?</p> <p>14 A. Well, ultimately the lawyer -- we</p> <p>15 didn't override any legal advice that he gave</p> <p>16 us. So I would guess it was mostly, ultimately,</p> <p>17 him.</p> <p>18 Q. But you don't remember for sure?</p> <p>19 A. Well, I would say that's for listening</p> <p>20 to a lawyer. And so I am sure that he made the</p> <p>21 ultimate decision for that.</p> <p>22 Q. I see.</p> <p style="text-align: right;">Page 315</p>	<p>1 Q. That is a modification of the Bernell</p> <p>2 agreement.</p> <p>3 Is that correct, sir?</p> <p>4 A. Yes, this is the actually the</p> <p>5 paragraph I was referencing before. I knew I</p> <p>6 had seen it somewhere.</p> <p>7 Q. When was this signed?</p> <p>8 A. Looks like around the same time, March</p> <p>9 of -- no, 30th of June, 1983.</p> <p>10 (Pause)</p> <p>11 Q. Where do you see that?</p> <p>12 A. Right before the -- oh, no, no.</p> <p>13 That's breaching an agreement with SUNY. I'm</p> <p>14 sorry. That's the last sentence above where we</p> <p>15 signed, sorry.</p> <p>16 It should be March 2nd, 1983.</p> <p>17 Q. Looks like there is one date under the</p> <p>18 first signature the last page: March 16, 1983?</p> <p>19 A. That's right. Same date as this.</p> <p>20 Q. But this is an amendment to the</p> <p>21 agreement, I guess that everyone agreed to.</p> <p>22 Is that your understanding?</p> <p style="text-align: right;">Page 317</p>

<p>1 A. I have forgotten -- I think it</p> <p>2 extended an opportunity, if they didn't reach an</p> <p>3 agreement with SUNY, that I could -- that I</p> <p>4 could deal with SUNY myself.</p> <p>5 I think is what it says. That's what</p> <p>6 I remember about this.</p> <p>7 Q. Okay. You can put that back.</p> <p>8 (Pause)</p> <p>9 Q. Where we left off on the copyright</p> <p>10 deposit -- you don't know who decided to remove</p> <p>11 the abstract, the index, the bibliography, and</p> <p>12 the Pierce test, right?</p> <p>13 A. It had to be our lawyer, because we</p> <p>14 wouldn't have expressed any authority over on</p> <p>15 what to put into a filing on a copyright</p> <p>16 registration.</p> <p>17 Q. Well, your lawyer, I guess, could have</p> <p>18 said that's okay, but it could have been your</p> <p>19 idea.</p> <p>20 A. That -- I don't remember that.</p> <p>21 Q. Do you remember one way or another</p> <p>22 whose idea it was?</p> <p style="text-align: right;">Page 318</p>	<p>1 earlier, I'm not sure that's accurate -- but</p> <p>2 whatever. That's what we put in the original</p> <p>3 paper.</p> <p>4 Q. Okay.</p> <p>5 Do you have any -- any information</p> <p>6 about whether the Copyright Office would want to</p> <p>7 know about the Pierce test and the fact that the</p> <p>8 authors of the paper said that their test was a</p> <p>9 modification of the Pierce test?</p> <p>10 Do you have any --</p> <p>11 A. I'm not a lawyer.</p> <p>12 Q. So you don't know whether the</p> <p>13 Copyright Office cares about that or not.</p> <p>14 Is that right?</p> <p>15 A. I don't know. I'm not a lawyer, so --</p> <p>16 Q. You don't know whether the Copyright</p> <p>17 Office's ability to judge whether your test was</p> <p>18 worthy of a copyright was diminished by the</p> <p>19 removal of the piece test in the abstract,</p> <p>20 right?</p> <p>21 You just don't know one way or the</p> <p>22 other?</p> <p style="text-align: right;">Page 320</p>
<p>1 A. I would suggest it's almost certain it</p> <p>2 was the lawyer's idea.</p> <p>3 Q. Why do you think the lawyer wanted to</p> <p>4 remove the Pierce test?</p> <p>5 A. Well, it was already copywritten. It</p> <p>6 had a registered copyright on it.</p> <p>7 Q. I mean, don't you think that the</p> <p>8 Copyright Office would want to know that, you</p> <p>9 know, the Pierce test was out there?</p> <p>10 A. The results of the Pierce test were</p> <p>11 filed with this paper. They had tables</p> <p>12 including the Pierce test, and they just have</p> <p>13 the test itself.</p> <p>14 Q. I mean, you say in your paper that,</p> <p>15 you know, that your test is a modification of</p> <p>16 the Pierce test.</p> <p>17 You know you say that, right?</p> <p>18 A. That's what it said --</p> <p>19 Q. In the abstract.</p> <p>20 A. Which is not in this now.</p> <p>21 Q. Right.</p> <p>22 A. Well, because -- as we discussed</p> <p style="text-align: right;">Page 319</p>	<p>1 A. I haven't looked at this closely</p> <p>2 enough to see if the Pierce -- I saw some Pierce</p> <p>3 tables in the back. So those are still in</p> <p>4 there. And I'm going to guess that the whole</p> <p>5 results of Pierce are in there as well, and the</p> <p>6 comparison.</p> <p>7 But I haven't looked at it enough.</p> <p>8 Q. My question is not -- it's different.</p> <p>9 My question is: Do you know whether</p> <p>10 the Copyright Office cares about the fact that</p> <p>11 the abstract was removed where the author said</p> <p>12 that the test was a modification of the Pierce</p> <p>13 test?</p> <p>14 You just don't know whether the</p> <p>15 Copyright Office may care about that?</p> <p>16 A. I'm not a copyright lawyer, so I don't</p> <p>17 know.</p> <p>18 Q. And you don't know whether the</p> <p>19 Copyright Office would care about the fact that</p> <p>20 the Pierce test itself in the appendix was</p> <p>21 removed either. You just don't know.</p> <p>22 Fair?</p> <p style="text-align: right;">Page 321</p>

<p>1 A. I'm not a lawyer.</p> <p>2 Q. So you don't know as a result, right?</p> <p>3 A. I -- lots of things I don't know today</p> <p>4 because I'm not a lawyer.</p> <p>5 Q. Right.</p> <p>6 But is this one of them, sir?</p> <p>7 A. Yes. We followed a lawyer's advice.</p> <p>8 And we certainly didn't try to talk him into or</p> <p>9 out of anything.</p> <p>10 Q. Okay.</p> <p>11 MR. GOETZ: I'll mark as Exhibit 24 a</p> <p>12 document bearing production number KDT0031754</p> <p>13 through 56.</p> <p>14 (Exhibit Devick 24, Document Bates</p> <p>15 stamped KDT0031754 through 31756, three-page</p> <p>16 document entitled: Additional Certificate of</p> <p>17 Registration of a Claim to Copyright, marked</p> <p>18 for identification)</p> <p>19 BY MR. GOETZ:</p> <p>20 Q. Do recognize this?</p> <p>21 A. It's a certification of registration</p> <p>22 for a claim of copyright.</p> <p style="text-align: right;">Page 322</p>	<p>1 sales in '76, '77, '78?</p> <p>2 A. I told him that we had been selling</p> <p>3 it, yes, with a copyright. He duplicated the</p> <p>4 copyright language on his contract. That's what</p> <p>5 was on there: Copyright care of Steven D. --</p> <p>6 except without the O.D. That's what we</p> <p>7 discussed earlier.</p> <p>8 Q. You are talking about on the agreement</p> <p>9 with Bernell?</p> <p>10 A. Yes, that -- it was part of that as</p> <p>11 well.</p> <p>12 Q. You see in box 6 on the second page,</p> <p>13 it says: Preexisting Material: None, Material</p> <p>14 Added to this Work: None?</p> <p>15 Do you see that?</p> <p>16 A. The material was --</p> <p>17 Q. The question is: Do you see it?</p> <p>18 A. Yes, I see it.</p> <p>19 Q. Okay. It sounds like what you are</p> <p>20 saying is that it was the attorney that removed</p> <p>21 from the deposit the Pierce test and put "none:</p> <p>22 here.</p> <p style="text-align: right;">Page 324</p>
<p>1 Q. And your lawyer signed it, right? --</p> <p>2 Herbert Bell?</p> <p>3 A. Yes.</p> <p>4 Q. Do you recognize the signature?</p> <p>5 A. No.</p> <p>6 Q. How do you know that's his signature?</p> <p>7 A. I guess I don't, but he apparently</p> <p>8 signed it.</p> <p>9 Q. Okay. Were you involved in preparing</p> <p>10 this form?</p> <p>11 A. No.</p> <p>12 Q. Did the lawyer ask you about any</p> <p>13 questions that relates to the information on</p> <p>14 this form?</p> <p>15 A. We told him what's happening with this</p> <p>16 copyright application.</p> <p>17 And, as I said, as far as no</p> <p>18 publication in line 3 there, we didn't know the</p> <p>19 publication -- I thought the publication was</p> <p>20 that 1983 when the American Optometric</p> <p>21 Association wrote the publication about it.</p> <p>22 Q. Did you tell your lawyer about all the</p> <p style="text-align: right;">Page 323</p>	<p>1 Is that right?</p> <p>2 A. He removed the Pierce test, but as he</p> <p>3 put "none" in the -- that -- this article this</p> <p>4 paper that he registered for had never been</p> <p>5 copywritten before. Only the test itself had</p> <p>6 been sold.</p> <p>7 Q. And the agreement with Bernell was</p> <p>8 before this, right?</p> <p>9 A. It says it was a month -- it's --</p> <p>10 according to this, it was a month before it --</p> <p>11 or two -- August instead of June or July, we</p> <p>12 just read.</p> <p>13 Q. Who was this guy Beardsley on Exhibit</p> <p>14 23?</p> <p>15 A. This was the Bernell outside counsel,</p> <p>16 I think. Maybe it was inside counsel.</p> <p>17 Q. Not your lawyer though?</p> <p>18 A. Not our lawyer.</p> <p>19 Q. Who is Chester and Paulen?</p> <p>20 A. Again, their lawyers.</p> <p>21 Q. So you think this is a letter from</p> <p>22 Bernell Corporation's lawyers to each other?</p> <p style="text-align: right;">Page 325</p>

<p>1 A. Outside counsel to inside counsel, I'm 2 going to guess. 3 In case -- I'm not even positive just 4 Beardsley was a lawyer. He might have been an 5 officer of the company. 6 But they both reside in either South 7 Bend or Elkhart, Indiana, which is where Bernell 8 is -- so, yes. 9 (Pause) 10 Q. In any event, Chester and Paulen is 11 not your lawyer. 12 Is that what you are saying? 13 A. That's right. 14 Q. So how come Bell is not copied on 15 here, if he was your lawyer? 16 A. I don't know. 17 Q. Do you think he saw this -- this 18 draft, Exhibit 23, this document? 19 A. I think so, but I'm not sure. I would 20 guess he did. 21 Q. Do you have any understanding as to 22 why given that -- your testimony that Bell was</p> <p style="text-align: right;">Page 326</p>	<p>1 A. No. 2 Q. So are you sure you didn't fill out 3 this form? 4 A. The copyright form? 5 Q. Yeah. 6 A. Absolutely. 7 Q. Why are you so certain of that? 8 A. Because I wouldn't fill out a 9 copyright form. 10 Q. Why not? 11 A. Because, as we've testified, I'm not a 12 lawyer. 13 Q. I know. But you want to be. 14 A. I really do, yes. 15 MR. SULLIVAN: All right. 16 The smiles don't get caught from both 17 sides with only one video. 18 THE WITNESS: Okay. 19 Let me just restate that: I don't 20 want to be. 21 MR. GOETZ: Okay. 22 BY MR. GOETZ:</p> <p style="text-align: right;">Page 328</p>
<p>1 involved in the Bernell agreements, he put 2 "Manufacturers and Locations: None" in item 7? 3 A. Well, he was involved with it. 4 I don't know why he put that. 5 Q. That doesn't seem right, does it? 6 A. I don't know. 7 Let me see. I didn't know what 8 "published" meant. So let's see what 9 manufacturing -- maybe he was referring to the 10 fact I was making these. 11 Q. You think he was? 12 A. I don't know. He may have been. 13 Q. Where do you see that? 14 I just don't see that. 15 A. It says -- says: Manufacturing 16 Locations. 17 Well, I was manufacturing -- I was 18 putting them together ourselves. Probably what 19 he meant. 20 Q. I see. 21 But you haven't talked to Mr. Bell in 22 the past five years, have you?</p> <p style="text-align: right;">Page 327</p>	<p>1 Q. Do you have any recollection sitting 2 here today of a specific conversation with your 3 lawyer about this registration form -- yes or 4 no? 5 A. No. 6 Q. When did you find out that the 7 copyright registration was granted? 8 A. I don't know. 9 Q. Did you have any communications of any 10 kind -- written or phone -- with the Copyright 11 Office or its staff during this registration 12 process? 13 A. I don't believe so. 14 Q. Why did you register the whole paper 15 and not just the test? 16 A. I'm not sure. It was the advice of 17 our lawyer, I'm sure. 18 (Pause) 19 Q. So back to item box 3 on this page 755 20 of Exhibit 24. 21 It says: No Publication. 22 But of course, the NYSOA paper had</p> <p style="text-align: right;">Page 329</p>

EXHIBIT 3

Page 1

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

KING-DEVICK TEST INC.,)
)
Plaintiff,)
)
v.) No. 1:17-cv-09307 (JPO)
)
NYU LANGONE HOSPITALS,)
NEW YORK UNIVERSITY,)
STEVEN L. GALETTA, and)
LAURA J. BALCER,)
)
Defendants.)
)

Video-recorded deposition of DARRELL G. SCHLANGE, O.D., taken at Illinois College of Optometry, 3241 South Michigan Avenue, Chicago, Illinois, before Donna M. Kazaitis, IL-CSR, RPR, and CRR, commencing at the hour of 1:54 p.m. on Wednesday, November 28, 2018.

DIGITAL EVIDENCE GROUP
1730 M Street, NW, Suite 812
Washington, D.C. 20036
(202) 232-0646

<p>1 THE VIDEOGRAPHER: This is Tape Number 2 1 to the videotaped deposition of Darrell Schlange 3 being taken by Fish & Richardson PC in the matter 4 of King-Devick Test, Incorporated vs. New York 5 Langone Hospitals, et al., in the U.S. District 6 Court for the Southern District of New York, Case 7 Number 17-CV-09307.</p> <p>8 This deposition is being held at 9 3241 South Michigan Avenue in Chicago, Illinois, 10 on November 28, 2018. The time on the video 11 monitor is 1:54 p.m.</p> <p>12 My name is Marvin Oltman. I'm the 13 legal videographer. The court reporter is Donna 14 Kazaitis. We are both in association with Digital 15 Evidence Group.</p> <p>16 Will counsel please introduce 17 themselves for the video record beginning with the 18 party noticing the proceeding.</p> <p>19 MS. McCALLION: Hello. My name is 20 Kristen McCallion from the law firm of Fish & 21 Richardson. We represent the defendants in this 22 case. And with me is my associate, Vivian Cheng,</p> <p style="text-align: right;">Page 6</p>	<p>1 A. Yes, Darrell Schlange. 2 Q. Have you been deposed before? 3 A. Yes. 4 Q. When was that? 5 A. Several years ago as an expert 6 witness. 7 Q. Okay. What were you an expert on? 8 A. It was an ocular health condition that 9 somebody -- I think I represented the defendant, 10 or was testifying in support of the defendant. 11 Q. Do you remember what year it was? 12 A. Probably 15 years ago. 13 Q. Okay. So you've been deposed before. 14 You probably know a lot of the ground rules. 15 A. Uh-huh. 16 Q. But I'm going to ask you a question, 17 to which you will reply. The court reporter has 18 to write everything down. 19 A. Sure. 20 Q. So verbal responses are required. 21 Shaking of the head, body language won't be picked 22 up. If you don't understand something, please ask</p> <p style="text-align: right;">Page 8</p>
<p>1 also from Fish & Richardson. 2 MR. KLUFT: Good afternoon again, 3 Dr. Schlange. My name is David Kluff. I'm from 4 the law firm of Foley Hoag in Boston, and I 5 represent King-Devick Test. And with me is Steven 6 Devick.</p> <p>7 MR. PERKINS: For the record, Floyd 8 Perkins from Nixon Peabody representing the 9 Illinois College of Optometry and the deponent.</p> <p>10 THE VIDEOGRAPHER: Will the court 11 reporter please swear in the witness. 12 (Witness sworn.)</p> <p>13 DARRELL SCHLANGE, O.D., 14 having been first duly sworn, was examined and 15 testified as follows:</p> <p>16 EXAMINATION 17 BY MS. McCALLION: 18 Q. Good afternoon, Professor. So as I 19 said, my name is Kristen McCallion, and I'm going 20 to be asking you a few questions this afternoon. 21 Would you mind stating your name 22 for the record, please.</p> <p style="text-align: right;">Page 7</p>	<p>1 me to clarify it. I'm happy to do so. If you 2 don't ask me to clarify, I'm just going to assume 3 that you've understood what I've asked. 4 Is there any reason why you can't 5 give full and accurate testimony this afternoon? 6 A. No. 7 Q. Okay. So how long -- you are a 8 professor currently at ICO; right? 9 A. Yes. 10 Q. When did you start here? 11 A. I graduated in 1964. I did a one-year 12 residency which involved some association being 13 with the faculty but it wasn't in the official 14 faculty position but it was sort of a residency 15 program. That was from '64 to '65. In '65 I 16 became full time to the faculty and I've been that 17 way 53 years. 18 Q. So your first year of teaching here, 19 that was in 1965? 20 A. Officially that's what the college 21 refers to, even though when I had the residency I 22 was in charge of a vision clinic. At that time it</p> <p style="text-align: right;">Page 9</p>

<p>1 have good, what we call saccades and fixation 2 ability. And here everything compresses closer 3 together. So it makes it even more difficult in 4 Card 3.</p> <p>5 So in our discussion we had, you 6 know, those children would often do very poorly on 7 this. So the question was, you know, they made a 8 tremendous number of mistakes in going from here 9 to there. And with eye movement and recordings we 10 know today that that's a real tough task for a 11 beginning reader with an immature visual system to 12 make that large movement from eight inches or so.</p> <p>13 So a lot of the kids have issues 14 with that, and that's why when they're reading a 15 regular book they kind of go to the end of one 16 line and get lost or skip lines or words and so 17 on.</p> <p>18 So in our discussion it became, you 19 know, maybe we need to do something a little 20 differently where it's more like not eight inches 21 saccade eye movement, but something that resembles 22 a little bit more reading, the actual reading,</p> <p style="text-align: right;">Page 50</p>	<p>1 different.</p> <p>2 So the thought was, hey, let's try 3 something different. So would mock up something 4 like this and then try it on a patient. The kid 5 seemed to do better. You know, we don't have any 6 norms, no set instructions, but it was that 7 process of enlightenment from the student side as 8 well as hey, you know, maybe this will work.</p> <p>9 So Alan King and Devick, or King 10 and Devick, kind of wanted to take this on as a 11 project.</p> <p>12 Q. Right.</p> <p>13 A. Okay. We saw the problems with what 14 we had. We saw the patients that had these 15 problems that were hard to diagnose or to identify 16 as to what's wrong. And we found that, you 17 know -- because on these second and third cards 18 they just couldn't do it as well.</p> <p>19 So we found that there seemed to be 20 some benefit in making these numbers on the 21 King-Devick here more random-like but not just 22 left-right, left-right, but make it more like a</p> <p style="text-align: right;">Page 52</p>
<p>1 which we know involves these little eye movements 2 that go across the page and so began to play 3 around with that idea.</p> <p>4 Again, this was a very, from an 5 instructor, this is a very positive kind of an 6 interaction. I'm sure you had it in law school 7 where you had certain professors that things 8 clicked, or if you taught, that you had certain 9 students where you get the sense that, yeah, they 10 get it. You know, you can see the mind going 11 into, yeah, this is the problem and these are 12 options, and you can just see the whole discerning 13 process underway.</p> <p>14 So with the different students in 15 that office area in the back of the lab, we 16 explored a lot of different things. There were 17 obviously with five or six students other points 18 of discussion, but these were very refreshing to 19 me. And it was like, you know, you just observe 20 this and you kind of help them along but you see 21 that they're starting to come up with something 22 creative and something new and something</p> <p style="text-align: right;">Page 51</p>	<p>1 reading situation.</p> <p>2 So here we had these eight 3 different lines and five on each. So here you had 4 40 different numbers that they had to read. So it 5 kind of clicked with them and here you had 30, you 6 know, 15 and 15.</p> <p>7 So you had more stimuli that the 8 patient had to read more numbers. So you had a 9 larger sampling of their reading ability. And 10 they started to kind of play around with the 11 format of this and try it on their patients.</p> <p>12 So at this point it was just, you 13 know, hey, this is an idea I have and the back and 14 forth of discussion, it was very rich.</p> <p>15 Q. So did you work with King and/or 16 Devick to create the King-Devick Test?</p> <p>17 A. I would say that, you know, in this 18 case in the format of students interacting on 19 cases they've seen, the discussion really started 20 with them, you know.</p> <p>21 Q. With them.</p> <p>22 A. With them and their patients. So they</p> <p style="text-align: right;">Page 53</p>

<p>1 came up with some of these ideas and looking at 2 what are the options available at that time. This 3 was pretty much it or just doing, you know, taking 4 a pencil and seeing how the patient does that 5 movement.</p> <p>6 So a lot of the creativity really 7 was generated at their level. We would have some 8 discussions and maybe modify it and so on. But a 9 lot of the basic concepts, the creativity, you 10 know, we bounced these ideas around among each 11 other and I would say as a mentoring on my part it 12 was more to keep them focused on it and to, you 13 know, work out a plan as to how we could really 14 test this out.</p> <p>15 Q. So is it fair to say that the 16 King-Devick Test is based on the Pierce test?</p> <p>17 A. In terms of a major -- that was one of 18 the major problems that the Pierce test had is 19 that it had these large saccades.</p> <p>20 A second problem was that the score 21 that you got at the end had just a mean, an 22 average score, and there were no standard</p> <p style="text-align: right;">Page 54</p>	<p>1 complete that as well as a separate set of data, 2 the errors.</p> <p>3 So it was generated by patients 4 that we had, a lot of discussion we had, ideas 5 that floated around, and looking at some of the 6 problems with the Pierce in its construction and 7 in its evaluation of the data and how do you 8 relate that to patient care.</p> <p>9 That was a huge problem. The 10 concept of, you know, let's have something that we 11 can get a number on, a score on, not just look at 12 the eyes, but something we can get a score on, but 13 it fell short in those two major areas.</p> <p>14 So the development of the 15 King-Devick worked around those and tried to 16 accommodate those errors by changing the pattern 17 of the saccades and the number of, what constitute 18 a failing and a passing score, determining 19 standard deviations on those different scores for 20 kids at different age levels.</p> <p>21 In their study they also went back 22 to do that for Pierce using Pierce's data to come</p> <p style="text-align: right;">Page 56</p>
<p>1 deviations for that data.</p> <p>2 A standard deviation in many of 3 these tests, even today, gives you a criteria for 4 success or failure. So if on a test like this you 5 have a mean and you have a standard deviation, and 6 the performance goes outside of that standard 7 deviation, that is a common criteria that we use 8 in many tests, perceptual tests as well as a 9 failing score.</p> <p>10 So if you have that data and you 11 have this standard deviation and if the score the 12 child gets is below that, they fail that score. 13 Pierce did not have that.</p> <p>14 So it was kind of like, you know, 15 we got numbers here. But, you know, and Pierce 16 also just looked at -- came up with one score. He 17 would factor in the time it took to complete this 18 test and do a formula to take into consideration 19 errors, mistakes that they made, but it would be 20 one score that was the result of the test.</p> <p>21 With the King-Devick, and still 22 today, there was looking at the time it takes to</p> <p style="text-align: right;">Page 55</p>	<p>1 up with standard deviations which gave that test a 2 great improvement. But the Pierce, when this 3 started going, the Pierce test pretty much, you 4 know, didn't last very long.</p> <p>5 Q. Do you think the King-Devick Test is 6 an improvement upon the Pierce test?</p> <p>7 A. Huge. But, again, looking at 50 8 years, I have worked with a lot of students and a 9 lot of different projects, it's just what, you 10 know, it's what a teacher would like, the students 11 are connecting and going that extra mile and 12 they're letting their creativity just sort of go 13 off, and sometimes you have to kind of reign them 14 in a little bit. But it was a good experience, 15 which is why it's still very vivid in my memory.</p> <p>16 Q. Okay. Just looking at the King-Devick 17 Test. I know you have your own copy. We can use 18 the copy of the King-Devick Test that's in that 19 paper that I gave to you.</p> <p>20 A. Sure. This one?</p> <p>21 Q. Right, you have that Exhibit 4. And 22 you got to flip to the end a little bit. There's</p> <p style="text-align: right;">Page 57</p>

<p>1 numbers on the bottom right. Do you see those?</p> <p>2 The number I'm looking at is 298340.</p> <p>3 MR. PERKINS: These little numbers</p> <p>4 right here, 340.</p> <p>5 THE WITNESS: Yes, okay.</p> <p>6 BY MS. McCALLION:</p> <p>7 Q. So I'm just looking at the spacing of</p> <p>8 the numbers on this test card.</p> <p>9 A. Uh-huh.</p> <p>10 Q. Right? You have this in front of you,</p> <p>11 the 298340?</p> <p>12 A. Yeah.</p> <p>13 Q. Did you work with Mr. Devick and</p> <p>14 Mr. King --</p> <p>15 A. Uh-huh.</p> <p>16 Q. -- on designing this particular card?</p> <p>17 A. Yeah, there were several different</p> <p>18 editions to that, as I recall. Eventually the key</p> <p>19 thing was to be random but the numbers close</p> <p>20 enough to where it would simulate typical reading</p> <p>21 ability, reading eye movements.</p> <p>22 So we had different editions that</p> <p style="text-align: right;">Page 58</p>	<p>1 also teaching something called the Vinset Test?</p> <p>2 A. No. I mean it was there. It used</p> <p>3 letters, I think, instead of numbers. The</p> <p>4 clinical situation we were dealing with is those</p> <p>5 that often were referred in for academic issues,</p> <p>6 and these might be first grader, second. And it</p> <p>7 was a real issue because they didn't want to read,</p> <p>8 you know, you get the whole, the whole global</p> <p>9 thing of, you know, a child begins to have</p> <p>10 behavioral issues if they can't function in a</p> <p>11 classroom.</p> <p>12 So many of those kids had poor</p> <p>13 recognition skills. So letters, even though it</p> <p>14 seems simple, were difficult. And there's a thing</p> <p>15 called visual verbal processing and it's a</p> <p>16 perceptual motor kind of a thing. When the child</p> <p>17 looks at it, they have to interpret and then they</p> <p>18 have to verbalize it, and that whole process,</p> <p>19 visual-verbal, is delayed in children that have</p> <p>20 these learning related problems.</p> <p>21 So that was more difficult for them</p> <p>22 when there were letters instead of numbers.</p> <p style="text-align: right;">Page 60</p>
<p>1 they would come up with and maybe try it on a</p> <p>2 patient, just kind of like testing it out in a</p> <p>3 preliminary way to see, you know, how does this</p> <p>4 work.</p> <p>5 Q. Okay.</p> <p>6 A. Yeah, that was kind of try something,</p> <p>7 what's our impression, let's modify it, and it was</p> <p>8 that kind of a process.</p> <p>9 Q. So the spacing there serves an</p> <p>10 important function; right?</p> <p>11 A. Yes.</p> <p>12 Q. And it's because it better measures</p> <p>13 how people read?</p> <p>14 A. The eye movements involved are closer</p> <p>15 to what reading eye movements are. More so than</p> <p>16 the example of where it's eight inches,</p> <p>17 left-right, left-right.</p> <p>18 So in that respect it was</p> <p>19 constructed to be more similar to reading eye</p> <p>20 movements as we would measure.</p> <p>21 Q. And do you recall around the same time</p> <p>22 when you were working with Mr. King and Devick</p> <p style="text-align: right;">Page 59</p>	<p>1 Numbers were easier for them to understand.</p> <p>2 So that's why that test was</p> <p>3 available, but we didn't really focus much on it.</p> <p>4 Q. Do you remember teaching anything</p> <p>5 called the Gilbert Test?</p> <p>6 A. I was not familiar with the Gilbert</p> <p>7 Test until a couple of the papers that came out</p> <p>8 after the New York study was done that made</p> <p>9 reference to the Gilbert Test. But we did not</p> <p>10 discuss the Gilbert at that time.</p> <p>11 Q. Do you remember the year of the</p> <p>12 New York study you just referred to?</p> <p>13 A. I think it was, the paper was '83</p> <p>14 possibly, something like that. Somewhere in my</p> <p>15 piles here I have the date of that. I was at that</p> <p>16 point, the Gilbert was not in any academic</p> <p>17 importance to us.</p> <p>18 Q. Okay.</p> <p>19 A. Just on that point. Since going back</p> <p>20 to the Gilbert Test, after hearing about it and</p> <p>21 knowing that it is mentioned in the subpoena --</p> <p>22 did I teach it? It's quite dramatic what was</p> <p style="text-align: right;">Page 61</p>

<p>1 and Mr. Devick handed you the final senior paper.</p> <p>2 A. Uh-huh.</p> <p>3 Q. And that's what we have in front of</p> <p>4 us, I believe.</p> <p>5 A. Sure.</p> <p>6 Q. Do you remember your impression of it</p> <p>7 at the time?</p> <p>8 A. The whole idea of the project was very</p> <p>9 excellent and positive and, you know, brought</p> <p>10 something new to the profession that we didn't</p> <p>11 have before.</p> <p>12 Q. Do you remember what grade you gave</p> <p>13 them?</p> <p>14 A. I don't. I hear that it was a B.</p> <p>15 I've heard that for years.</p> <p>16 Q. You don't remember.</p> <p>17 A. I know it was a recognized paper. You</p> <p>18 know, having taught for many years and having this</p> <p>19 experience where, you know, maybe the student</p> <p>20 doesn't feel they got the grade they deserved or</p> <p>21 whatever, and, you know, years later we'll see</p> <p>22 them at a meeting and we'll laugh about it and</p> <p style="text-align: right;">Page 74</p>	<p>1 One was thoroughness of research;</p> <p>2 efficiency and ability to meet deadlines; 3,</p> <p>3 ability to work independently; 4, quality and</p> <p>4 organization of writing; 5, grammar, spelling,</p> <p>5 punctuation, follow the syllabus guidelines; and</p> <p>6 6, completeness of referencing.</p> <p>7 Just looking at, you know, not to</p> <p>8 make any judgments at this point, but there were</p> <p>9 more references that we did look at at that time</p> <p>10 than what are listed here in the final document.</p> <p>11 Q. Do you recall what those references</p> <p>12 were?</p> <p>13 A. Well, some of the work of like Helen</p> <p>14 Robinson, people like that.</p> <p>15 Q. So Helen Robinson --</p> <p>16 A. You know, other people, even Pierce.</p> <p>17 So I don't want -- I'm not certain that it was a</p> <p>18 B. I have always viewed this as an excellent</p> <p>19 paper. We don't just look at the outcome of the</p> <p>20 study and what all the work is involved, these</p> <p>21 other parameters involved. But the word is that I</p> <p>22 gave them a B. I do not recall that.</p> <p style="text-align: right;">Page 76</p>
<p>1 maybe go have a drink and it's history.</p> <p>2 This, you know, I never imagined --</p> <p>3 I know that this has been mentioned numerous times</p> <p>4 that it was a B. And, again, I have no record</p> <p>5 that it was a B, but it has been an issue and I</p> <p>6 never imagined that I would have to discuss this</p> <p>7 in a subpoena in federal court.</p> <p>8 Q. I can imagine.</p> <p>9 A. I do want to mention that it isn't</p> <p>10 just one criteria. A basic purpose of this course</p> <p>11 is to help the student understand the scientific</p> <p>12 method so they're better able to discern what's a</p> <p>13 good study, what's bad, for the benefit of their</p> <p>14 patients. Not that they're going to do research</p> <p>15 in their practice, their clinical practice, but</p> <p>16 that they know what to look for, what's good</p> <p>17 publication, what's good research, what isn't.</p> <p>18 At that time I know we had the same</p> <p>19 criteria. Today we have criteria, because today</p> <p>20 our students still do this, today we use six</p> <p>21 points. I think there might have been five at</p> <p>22 that point.</p> <p style="text-align: right;">Page 75</p>	<p>1 Q. Okay. Well, we'll --</p> <p>2 A. It wasn't just based on one factor.</p> <p>3 It was based on other things because, again, we</p> <p>4 wanted them a learning experience in the whole</p> <p>5 field of doing research and putting it together</p> <p>6 for a publication.</p> <p>7 Q. You said a little bit earlier that</p> <p>8 this paper, their senior paper, was a recognized</p> <p>9 paper. What do you mean by that?</p> <p>10 A. What I mean by that is that even</p> <p>11 though at that time it was kind of at meetings</p> <p>12 would be spread by kind of word of mouth and, you</p> <p>13 know, at some meetings it might be focused on</p> <p>14 child care, reading and vision, you know. It used</p> <p>15 to start to come forth that hey, you know, those</p> <p>16 guys had an interesting idea.</p> <p>17 So at that point it was basically</p> <p>18 at meetings, check this out, you know, and people</p> <p>19 would check it out and like it.</p> <p>20 Q. Were these meetings before they handed</p> <p>21 in the final paper to you?</p> <p>22 A. No.</p> <p style="text-align: right;">Page 77</p>

<p>1 Q. Okay. It was meetings after they had 2 handed in the final paper.</p> <p>3 A. Yeah.</p> <p>4 Q. Do you know how people learned of it?</p> <p>5 A. A lot that, and when it was done, 6 included in the battery of tests that New York 7 did.</p> <p>8 Q. When was that?</p> <p>9 A. I think that was in the early '80s.</p> <p>10 Q. Okay. So just going back to when 11 Mr. King and Mr. Devick handed you this paper, was 12 there a policy at the time at the school to give 13 senior papers to the library?</p> <p>14 MR. KLUFT: Objection, foundation.</p> <p>15 BY MS. McCALLION:</p> <p>16 Q. You can answer.</p> <p>17 A. We would do that with all of them.</p> <p>18 Q. You did that with all of them.</p> <p>19 A. They were put in a special place, 20 special cabinet. I tried to keep copies of any of 21 those that I was involved with. But they were 22 kept in the library. Most of them just collected</p> <p style="text-align: right;">Page 78</p>	<p>1 the original King-Devick was like and just kind of 2 tweak it around a little bit.</p> <p>3 So it was like for an internal 4 thing that students, maybe some faculty would go 5 in and sort that out. But the way it spread 6 outside of the institution was more by at a 7 meeting and just, you know, word of mouth.</p> <p>8 Q. Okay. So do you recall having a copy 9 of their senior paper and physically giving it to 10 the library?</p> <p>11 A. I don't know how that happened. I 12 just know that the library somehow ended up 13 getting copies of all the papers.</p> <p>14 Q. Do you know when the library first got 15 the copy of the King-Devick paper?</p> <p>16 A. I don't. I assume shortly after it 17 was done.</p> <p>18 Q. In 1976.</p> <p>19 A. Yeah.</p> <p>20 Q. Did you retain a copy of their final 21 paper?</p> <p>22 A. I did.</p> <p style="text-align: right;">Page 80</p>
<p>1 dust. And when the college went through 2 remodeling, they had to eliminate those.</p> <p>3 Q. Right, we heard about that.</p> <p>4 A. So many of them were returned to the 5 original author, the student author.</p> <p>6 Q. So was it a policy at the time to give 7 the student papers to the library?</p> <p>8 MR. KLUFT: Objection, foundation.</p> <p>9 THE WITNESS: No, I don't think it was 10 a formal policy. I think, you know, at that time 11 when maybe -- you know, today that might 12 immediately thereafter lead to a publication. At 13 that time the students, they graduated, they left. 14 But some of the work was really good, including 15 this.</p> <p>16 So we wanted this to be somewhere 17 that if another student, like the one that I 18 mentioned, Blashill, the one where we did the 19 modification --</p> <p>20 BY MS. McCALLION:</p> <p>21 Q. Yes.</p> <p>22 A. -- you know, he could go and see what</p> <p style="text-align: right;">Page 79</p>	<p>1 Q. Did you start to use that final paper 2 in your teachings in the lab here or in the clinic 3 or in your classes?</p> <p>4 A. No.</p> <p>5 Q. What did you do with it?</p> <p>6 A. Well, we didn't -- at that time we 7 didn't start on a regular basis of using that in 8 the clinic. That came about a little later. As 9 it became more formalized, you know, with the test 10 plates and the like.</p> <p>11 So to make those kinds of changes 12 in the curriculum and incorporate in the clinic, 13 you need something like this, you need something, 14 some sort of norms that you can quickly look at. 15 And that came but we didn't have that at first.</p> <p>16 We had all the numbers and 17 everything, but to have this in the form in which 18 a clinician could say in short time, yeah, this 19 child failed, this child didn't, that was a 20 process of transitioning it into the profession.</p> <p>21 Q. I see.</p> <p>22 MR. KLUFT: Can I just state for the</p> <p style="text-align: right;">Page 81</p>

<p>1 for bringing that.</p> <p>2 (Deposition Exhibit 7 was marked</p> <p>3 for identification.)</p> <p>4 MS. McCALLION: And let's just mark as</p> <p>5 Exhibit 8.</p> <p>6 MR. PERKINS: There's two sets of</p> <p>7 those.</p> <p>8 MS. McCALLION: Yeah.</p> <p>9 MR. PERKINS: That was the stuff he</p> <p>10 was talking about Reading Plus and --</p> <p>11 MS. McCALLION: Taylor.</p> <p>12 MR. PERKINS: -- Taylor.</p> <p>13 (Deposition Exhibit 8 was marked</p> <p>14 for identification.)</p> <p>15 BY MS. McCALLION:</p> <p>16 Q. So Exhibit 8 references the testimony</p> <p>17 you gave prior to the break about Taylor and the</p> <p>18 Taylor test.</p> <p>19 MR. PERKINS: You got to have a verbal</p> <p>20 answer.</p> <p>21 THE WITNESS: Yes, specifically the</p> <p>22 eye movement recording system they had.</p> <p style="text-align: right;">Page 86</p>	<p>1 BY MS. McCALLION:</p> <p>2 Q. I thought you said that. I think you</p> <p>3 made a reference to New York. Maybe that's what</p> <p>4 it was.</p> <p>5 Are you familiar with the NYSOA?</p> <p>6 A. Yes.</p> <p>7 Q. Okay. What is the NYSOA?</p> <p>8 A. In New York they developed or wanted</p> <p>9 to do a battery of tests for children in the</p> <p>10 New York public school system and they wanted to</p> <p>11 have a quick and effective way to look at eye</p> <p>12 movements.</p> <p>13 So they selected the King-Devick as</p> <p>14 the part of their battery to use. And they had</p> <p>15 other alternatives or other choices like the</p> <p>16 Pierce and some recording systems that were very</p> <p>17 cumbersome. But they included the King-Devick in</p> <p>18 their battery of tests for these large sample of</p> <p>19 public school children in New York City.</p> <p>20 Q. How do you know about this test, the</p> <p>21 NYSOA test?</p> <p>22 A. Well, they put their name on it after</p> <p style="text-align: right;">Page 88</p>
<p>1 MR. KLUFT: This is the Reading Plus.</p> <p>2 MS. McCALLION: Yes.</p> <p>3 MR. KLUFT: And does it include these</p> <p>4 pages as well? It looks like a separate document.</p> <p>5 MR. PERKINS: Well, that goes with the</p> <p>6 Taylor pages.</p> <p>7 MS. McCALLION: Yeah.</p> <p>8 MR. KLUFT: Okay.</p> <p>9 MS. McCALLION: Let's do one, two,</p> <p>10 three, four, five pages total.</p> <p>11 THE WITNESS: And the comment about</p> <p>12 Taylor, again, is that concurrent with all this</p> <p>13 other stuff going on, he and his company developed</p> <p>14 the eye movement recording systems that today is</p> <p>15 still used.</p> <p>16 BY MS. McCALLION:</p> <p>17 Q. You mentioned before the break, I</p> <p>18 think you mentioned, correct me if I'm wrong,</p> <p>19 please, the NYSOA?</p> <p>20 A. Uh-huh.</p> <p>21 MR. KLUFT: I'll just object. I don't</p> <p>22 recall that, but if the witness says it is...</p> <p style="text-align: right;">Page 87</p>	<p>1 they used it. Somewhere there's a publication. I</p> <p>2 have it somewhere here.</p> <p>3 Q. That's okay.</p> <p>4 A. That they made after the procedure was</p> <p>5 done, after they had done all the data, and their</p> <p>6 conclusion was that it was an effective screening</p> <p>7 method.</p> <p>8 Q. So you found out about the NYSOA</p> <p>9 testing once their publication came out.</p> <p>10 A. Yeah.</p> <p>11 Q. You were not involved --</p> <p>12 A. No.</p> <p>13 Q. -- in the NYSOA testing.</p> <p>14 A. No. So they put their name on it.</p> <p>15 Q. The NYSOA put their name on it.</p> <p>16 A. Yeah.</p> <p>17 Q. On the test.</p> <p>18 A. Yeah, on the test, based on their use</p> <p>19 of it in this huge screening project they did in</p> <p>20 New York City.</p> <p>21 Q. Did anyone from the NYSOA contact you</p> <p>22 at any point in time about this particular test?</p> <p style="text-align: right;">Page 89</p>

<p>1 A. No. That was part of the word of</p> <p>2 mouth thing that was growing about this test, like</p> <p>3 hey, you know, check this out, this is good.</p> <p>4 Q. How do you know that?</p> <p>5 A. Because I went to meetings and I know</p> <p>6 this was the nature of a lot of communication.</p> <p>7 Q. So what meetings are you referring to</p> <p>8 there?</p> <p>9 A. They could be -- at that time it would</p> <p>10 be the Academy of Optometry, American Academy of</p> <p>11 Optometry, American Optometric Association, it</p> <p>12 would be the Optometric Extension Program, OEP.</p> <p>13 At that time there were a lot of</p> <p>14 local networking systems or groups that would</p> <p>15 meet, for example, in Chicago every year and</p> <p>16 basically speakers and participants were from this</p> <p>17 metropolitan area. So a lot of the format of</p> <p>18 those was not just lecture but a lot of time just</p> <p>19 to mingle and say, you know, hey, this worked for</p> <p>20 me, check it out.</p> <p>21 Q. And when you said before meetings at</p> <p>22 that time, are we talking about 1976, 1977?</p> <p style="text-align: right;">Page 90</p>	<p>1 A. No, just that -- you mean that it</p> <p>2 would be sold there or something or what?</p> <p>3 Q. No, they just had a copy.</p> <p>4 A. Yeah, no, it just was, you know, hey,</p> <p>5 look, we don't have a lot of options when it comes</p> <p>6 to eye movements that's quick and effective, you</p> <p>7 know, you got the elaborate stuff with the</p> <p>8 recording systems and technology, but to actually</p> <p>9 have something that would be a few minutes</p> <p>10 screening test, that was new and very positive</p> <p>11 reception of people.</p> <p>12 Q. So if you could help me understand the</p> <p>13 process. Mr. King and Mr. Devick were students,</p> <p>14 they completed the senior project, they handed the</p> <p>15 paper in to you. You graded it. We're not going</p> <p>16 to go into that. And then at some point in time a</p> <p>17 copy of that paper was given here to the library</p> <p>18 at ICO?</p> <p>19 MR. KLUFT: Objection. You can</p> <p>20 answer.</p> <p>21 THE WITNESS: It probably was just</p> <p>22 within that year.</p> <p style="text-align: right;">Page 92</p>
<p>1 A. Probably '60s, '70s.</p> <p>2 Q. '70s.</p> <p>3 A. Yeah, into the '80s.</p> <p>4 Q. Late '70s?</p> <p>5 A. I suppose, sure.</p> <p>6 Q. At some of these meetings the</p> <p>7 King-Devick Test was being discussed. Is that</p> <p>8 your recollection?</p> <p>9 A. Not from the podium.</p> <p>10 Q. Not from the podium. But in the</p> <p>11 mingling of --</p> <p>12 A. Yeah.</p> <p>13 Q. -- the attendees?</p> <p>14 A. Yeah. Yes.</p> <p>15 Q. Were you part of that discussion</p> <p>16 during this mingling?</p> <p>17 A. I would be.</p> <p>18 MR. KLUFT: I'm just going to object</p> <p>19 to the form, vague.</p> <p>20 BY MS. McCALLION:</p> <p>21 Q. Do you recall the people having the</p> <p>22 test at these meetings?</p> <p style="text-align: right;">Page 91</p>	<p>1 BY MS. McCALLION:</p> <p>2 Q. Within the year.</p> <p>3 A. You know, because all the senior</p> <p>4 papers had to be turned in at about the same time.</p> <p>5 So that's my recollection is that just to have a</p> <p>6 place where people could, fellow students could</p> <p>7 look at it and see it.</p> <p>8 Q. So what's your understanding of how</p> <p>9 people outside of ICO found out about this</p> <p>10 King-Devick project?</p> <p>11 MR. KLUFT: Objection, foundation.</p> <p>12 THE WITNESS: Probably -- you know,</p> <p>13 this is the publication I was looking for, and</p> <p>14 this I think is even mentioned in one of the</p> <p>15 countersuit things. But this was the results of</p> <p>16 their study.</p> <p>17 BY MS. McCALLION:</p> <p>18 Q. The NYSOA.</p> <p>19 A. Yeah.</p> <p>20 Q. Okay. Well, we'll probably --</p> <p>21 A. That's a group --</p> <p>22 Q. Let's just leave this hear for now.</p> <p style="text-align: right;">Page 93</p>

<p>1 A. The publisher.</p> <p>2 Q. Okay.</p> <p>3 A. From the point when it's submitted for</p> <p>4 publication and when it's actually published.</p> <p>5 Q. Right.</p> <p>6 So I'd like to ask you about what</p> <p>7 was happening here at ICO around 1976, perhaps</p> <p>8 1977. So you received a copy of the King and</p> <p>9 Devick paper. I think we've established that the</p> <p>10 library received a copy. You're just not</p> <p>11 necessarily sure how the library got the copy.</p> <p>12 A. Just that we did that to all student</p> <p>13 papers so that -- because there was interest in,</p> <p>14 some students had interest in looking at what</p> <p>15 their colleagues did.</p> <p>16 Q. Okay. In your recollection did the</p> <p>17 students at that time know that their senior</p> <p>18 projects would be given to the library?</p> <p>19 MR. KLUFT: Objection, foundation.</p> <p>20 THE WITNESS: Uh-huh, I don't know if</p> <p>21 they knew that or not. It's just that I know many</p> <p>22 of them did end up in a file cabinet.</p> <p style="text-align: right;">Page 98</p>	<p>1 faculty. You know, it's the end of a year and</p> <p>2 suddenly you ramp up for another year. So there</p> <p>3 isn't a lot of time to develop, you know, in that</p> <p>4 period of time to, you know, get it to a point</p> <p>5 where it could be used in a large scale basis.</p> <p>6 Q. So there came a point in time I</p> <p>7 believe when you added the King-Devick senior</p> <p>8 paper to your reserve list; is that correct?</p> <p>9 A. I think it was not listed in our</p> <p>10 syllabus. Somehow, I'm not sure how it worked</p> <p>11 out, that it was on a reserve list.</p> <p>12 We do have, when we teach a course,</p> <p>13 we have a syllabus that lists the periodicals or</p> <p>14 the journals or textbooks that are on reserve and</p> <p>15 those that are recommended. This, I don't</p> <p>16 remember including that in that. Because it was</p> <p>17 never required, you know, as a reference.</p> <p>18 We did probably about the time of</p> <p>19 this or later '80s there was a book that did go</p> <p>20 into eye movement issues for children, eye</p> <p>21 movement, it was by Kirfreda at SUNY, State</p> <p>22 University of New York. And he made reference to</p> <p style="text-align: right;">Page 100</p>
<p>1 BY MS. McCALLION:</p> <p>2 Q. Well, did you talk to Mr. King or</p> <p>3 Mr. Devick about the fact that their paper would</p> <p>4 be given to the library?</p> <p>5 A. No.</p> <p>6 Q. So you don't know if they knew or if</p> <p>7 they did not know that the copy of the paper was</p> <p>8 in the library?</p> <p>9 A. That's correct.</p> <p>10 Q. Okay.</p> <p>11 A. I assume they probably did not know.</p> <p>12 Q. Did not know.</p> <p>13 A. Yeah.</p> <p>14 Q. Why do you assume that?</p> <p>15 A. This is usually in the spring of the</p> <p>16 year, you know, graduation, people wanting to move</p> <p>17 on. So there's other issues that they're dealing</p> <p>18 with, finding a place to practice, establishing a</p> <p>19 new home. And so some of these things, even</p> <p>20 though they were significant, kind of get pushed</p> <p>21 to a lower priority.</p> <p>22 And it's the same for us on the</p> <p style="text-align: right;">Page 99</p>	<p>1 the King-Devick.</p> <p>2 So when these things began to</p> <p>3 evolve, like this publication, now people could</p> <p>4 see this, and Kirfreda would note it in his</p> <p>5 textbook and talk about the good things about it.</p> <p>6 So we would reference his textbook. I don't</p> <p>7 remember specifically referencing the senior</p> <p>8 project.</p> <p>9 I think what, and I don't know,</p> <p>10 they may have just somehow always connected my</p> <p>11 name to the paper.</p> <p>12 Q. Who connected your name to the paper?</p> <p>13 A. Whatever documentation here, that</p> <p>14 sometimes the papers would be identified by the</p> <p>15 student and also by the faculty.</p> <p>16 Q. I see. So you can't recall a</p> <p>17 particular point in time when you told the library</p> <p>18 to ensure that the King and Devick paper was on</p> <p>19 the reserve list for one of your classes?</p> <p>20 A. I did not do that, no.</p> <p>21 Q. But it was on the reserve list for one</p> <p>22 of your classes?</p> <p style="text-align: right;">Page 101</p>

<p>1 were -- I'm not understanding what you're saying.</p> <p>2 In this document here you have here</p> <p>3 listed what appear to be some of the student</p> <p>4 scores.</p> <p>5 Q. Uh-huh.</p> <p>6 A. Okay. That's not in here.</p> <p>7 Q. Why not?</p> <p>8 A. I didn't copy it.</p> <p>9 Q. I see. But also what's not in your</p> <p>10 copy -- well, we can go through it. I'm trying to</p> <p>11 make sense of what's not in the copy you gave us.</p> <p>12 So it looks like what's not in the</p> <p>13 copy that you gave us is -- and you can compare it</p> <p>14 to the spiral bound -- is the Pierce saccade test</p> <p>15 and the actual Pierce saccade test itself.</p> <p>16 MR. KLUFT: I'm sorry, Counsel. Just</p> <p>17 because "spiral bound" is sort of a term of art in</p> <p>18 this case, can you just identify the exhibit</p> <p>19 number you're talking about.</p> <p>20 MS. McCALLION: Do you have that?</p> <p>21 Yeah --</p> <p>22 MR. KLUFT: Which is 4 I think?</p> <p style="text-align: right;">Page 110</p>	<p>1 So I think what we attempted to</p> <p>2 retrieve was the data and comparing the two tests</p> <p>3 and the text of the article, I mean the text of</p> <p>4 the paper. Not all of the exhibits like the</p> <p>5 Pierce test.</p> <p>6 Q. So your personal copy of the paper,</p> <p>7 which is Exhibit 9, is this the copy you've had</p> <p>8 since 1976?</p> <p>9 A. No, because I don't know when I got</p> <p>10 it. My recollection is that when we completed it,</p> <p>11 we graded it, it went to administration. Somehow</p> <p>12 it got into a file cabinet in the library, and</p> <p>13 subsequent to that I requested a copy of the</p> <p>14 paper.</p> <p>15 Q. From who?</p> <p>16 A. My TA, to go and make a copy of it.</p> <p>17 Q. From the library?</p> <p>18 A. Uh-huh.</p> <p>19 Q. Okay.</p> <p>20 A. From the stacks.</p> <p>21 Q. I see.</p> <p>22 A. Because I always want to have a copy</p> <p style="text-align: right;">Page 112</p>
<p>1 MS. McCALLION: It's 4.</p> <p>2 THE WITNESS: Yeah.</p> <p>3 BY MS. McCALLION:</p> <p>4 Q. So based on my review, and you can</p> <p>5 correct me if you think I'm wrong, your personal</p> <p>6 copy of the paper does not have the Pierce saccade</p> <p>7 test and test data.</p> <p>8 A. Right.</p> <p>9 Q. Is that right?</p> <p>10 A. That's correct, yeah.</p> <p>11 Q. Do you know why that is?</p> <p>12 A. No.</p> <p>13 Q. Okay.</p> <p>14 A. I didn't copy it. I mean somebody</p> <p>15 copied it for me.</p> <p>16 Q. And I don't believe your actual copy</p> <p>17 of the paper that you gave us has the King-Devick</p> <p>18 Test in it either.</p> <p>19 A. It may not. I think the interest at</p> <p>20 that time was to try to get the data of the two</p> <p>21 because the actual, what the cards look like, you</p> <p>22 know, we already knew what that was.</p> <p style="text-align: right;">Page 111</p>	<p>1 of whatever I've participated in.</p> <p>2 Q. And the copy that you graded was given</p> <p>3 back to Mr. King or Mr. Devick; is that right?</p> <p>4 A. Or to the administration I think for</p> <p>5 recording. But then ultimately they got the</p> <p>6 paper, yes.</p> <p>7 Q. Right. Who was your TA that you asked</p> <p>8 to get a copy? Do you recall?</p> <p>9 A. No.</p> <p>10 Q. Do you recall when it was, what year?</p> <p>11 A. It was probably that summer or</p> <p>12 something like that.</p> <p>13 Q. Okay. So did there come a point in</p> <p>14 time where you were using the King-Devick Test in</p> <p>15 your classes here at ICO?</p> <p>16 A. Say that again. You mean when did I</p> <p>17 start?</p> <p>18 Q. When did you start? When did you</p> <p>19 start using the King-Devick Test in your classes</p> <p>20 here at ICO?</p> <p>21 A. I don't know. We started using it in</p> <p>22 lab probably, you know, 20 years ago, that's just</p> <p style="text-align: right;">Page 113</p>

<p>1 an estimation, as a procedure to do. But it was 2 starting to then show up in other courses too, 3 mentioning let's say some of the courses on child 4 development for example. I'm just throwing that 5 one out as an example.</p> <p>6 You know, it began to be mentioned, 7 not that we sit down and learn how to do the test, 8 but it's mentioned as something that has some 9 clinical value.</p> <p>10 Q. And were you talking to Mr. Devick at 11 that time?</p> <p>12 A. No.</p> <p>13 Q. Have you ever used the King-Devick 14 Test in your private practice?</p> <p>15 A. I have.</p> <p>16 Q. When did you start doing that?</p> <p>17 A. I've done it rarely. Sometimes if we 18 have a patient that has some kind of an oculomotor 19 problem, I would do that, yes.</p> <p>20 Q. Do you remember when you first did 21 that?</p> <p>22 A. No.</p> <p style="text-align: right;">Page 114</p>	<p>1 patients have unusual eye movement problems, it 2 could be concussion related, it could be academic 3 or grade related. I have a clinic period where I 4 deal with these special testing cases. We call it 5 special testing.</p> <p>6 So a key part of that is the eye 7 movement recordings, which is really, you know, 8 the King-Devick and the developmental eye movement 9 test, they're more subjective, you need a response 10 from the patient. And a key part of an assessment 11 of any eye movement problem, to really do a fine 12 diagnosis, get fine detail, is with eye movement 13 recordings. So that's been my real focus.</p> <p>14 Q. Do you recall when the first time you 15 saw the King-Devick Test cards in, I guess in an 16 usable format as you might say? And I think 17 you're talking about --</p> <p>18 MS. McCALLION: We need to change 19 these numbers. Did we make copies of these?</p> <p>20 MR. PERKINS: No, we didn't.</p> <p>21 MR. KLUFT: Do you want to use one of 22 the pre-marked ones?</p> <p style="text-align: right;">Page 116</p>
<p>1 Q. Do you think it could have been around 2 the late '70s?</p> <p>3 A. No, it wouldn't have been then.</p> <p>4 Q. Why not?</p> <p>5 A. Just because it wasn't available.</p> <p>6 Q. Even though you had a copy of the 7 paper --</p> <p>8 A. Yeah.</p> <p>9 Q. -- with the test cards in it?</p> <p>10 A. I was more into -- my whole direction 11 and research and clinical practice, even today, is 12 eye movement recording. So that's my real focus.</p> <p>13 So when I would see a patient, 14 whether it was private or here, the emphasis of 15 the analysis was eye movement recordings.</p> <p>16 We would also currently, and that's 17 one of the documents that you have that shows how 18 I use it today, there were two case examples that 19 somewhere are in -- I think they were discussed 20 earlier -- that shows by example how we use it, or 21 I use it today.</p> <p>22 We have in clinic, if certain</p> <p style="text-align: right;">Page 115</p>	<p>1 MS. McCALLION: They're a little 2 different.</p> <p>3 MR. KLUFT: All right, sorry. I'm 4 just trying to help.</p> <p>5 BY MS. McCALLION:</p> <p>6 Q. So I think, and I don't want to put 7 words in your mouth, so you can correct me if I'm 8 wrong, but you said that the test wasn't usable 9 but then at some point in time it became usable; 10 right?</p> <p>11 A. Uh-huh.</p> <p>12 Q. So how did it become usable in your 13 opinion?</p> <p>14 A. When it was in that format.</p> <p>15 Q. Okay. When it was in like a 16 spiral-bound, hard copy format?</p> <p>17 A. When you had the flip charts, yeah.</p> <p>18 Q. When's the first time you saw it in 19 this type of format?</p> <p>20 A. I don't know.</p> <p>21 Q. Any estimation on years?</p> <p>22 A. We include that in the lab manual that</p> <p style="text-align: right;">Page 117</p>

<p>1 we had previously sent to you, you have a copy of 2 it right in front of you there, in your right 3 hand.</p> <p>4 MS. McCALLION: We can mark the lab 5 manual as a exhibit.</p> <p>6 MR. KLUFT: Sounds like a good idea.</p> <p>7 MS. McCALLION: So this will be 10 --</p> <p>8 THE WITNESS: So I would say during 9 the last ten years possibly.</p> <p>10 BY MS. McCALLION:</p> <p>11 Q. The last ten years is the first time 12 you saw the King-Devick Test in the --</p> <p>13 A. No, first time we included it in the 14 lab.</p> <p>15 Q. I see.</p> <p>16 MS. McCALLION: Let's take a breather 17 for a second and we'll mark this as 10, Exhibit 18 10, the lab manual, and then we can talk about it. 19 (Deposition Exhibit 10 was marked 20 for identification.)</p> <p>21 BY MS. McCALLION:</p> <p>22 Q. So aside from the lab manual, do you</p> <p style="text-align: right;">Page 118</p>	<p>1 experiments, and we've kind of moved it more into 2 a clinical perspective and more relevant to 3 patient care today. So that's done more with me.</p> <p>4 But the other two authors, 5 Alexander and Lee, one is at a different 6 institution, I think he's retired, and Dr. Lee is 7 from here, and he retired a couple years ago.</p> <p>8 So it's been a transition to move 9 this lab more into clinical relevance with case 10 examples. And that's why, you know, at the very 11 end we have an example of how we used some of 12 these procedures. The format of each lab is to -- 13 format of each lab is to have a discussion at the 14 end, the two-hour period, you know, gives these -- 15 currently these are second year students.</p> <p>16 So clinic is there. They observe, 17 they do some things in clinic, but it seems so far 18 away. So to give some significance to the lab, we 19 use a lot of case examples so they can connect the 20 two. And, in fact, one of the powers, it's called 21 laboratory 4.</p> <p>22 Q. What page are you on, if there are</p> <p style="text-align: right;">Page 120</p>
<p>1 recall when in your view the King-Devick Test was 2 in a form that it was testable?</p> <p>3 A. No.</p> <p>4 Q. So I think you just said that -- so 5 you have the lab manual in front of you; right?</p> <p>6 A. Uh-huh.</p> <p>7 Q. This is Exhibit 10. And this is 8 something that you produced to us; right?</p> <p>9 A. Uh-huh.</p> <p>10 Q. And is this lab manual a document that 11 you're using currently?</p> <p>12 A. This is from the previous year, yes.</p> <p>13 Q. Okay.</p> <p>14 A. Similar to now.</p> <p>15 Q. Did you create this document?</p> <p>16 A. There's three authors. The bottom two 17 are retired, haven't been here for years. So it 18 started as a document with three different 19 authors. Common is to keep some of the 20 originating authors on the document.</p> <p>21 So this goes back to when it was 22 more just visual science types of activities and</p> <p style="text-align: right;">Page 119</p>	<p>1 page numbers.</p> <p>2 A. I don't know. They're not numbered. 3 It looks like this, laboratory 4.</p> <p>4 We've done this the last six or 5 eight years where students in small groups have to 6 do a presentation on a topic. It can be something 7 related to ocular motility. It could be, you 8 know, the eye movement complications with multiple 9 sclerosis for example or Alzheimer's.</p> <p>10 So they have to do a presentation, 11 four or five at the max, with a PowerPoint and 12 period of discussion. So we give them some ideas 13 on topics, but they have to do this as a part of 14 their lab effort. And they do it, it can be two 15 people sometimes, and can use five or six 16 people -- well, no, five is the max, four or five 17 people. They do a good job. And they have to, 18 you know, start from scratch.</p> <p>19 Q. In 1976 when Mr. King and Mr. Devick 20 handed in their senior project to you, did they 21 have to present it to their classmates?</p> <p>22 A. No.</p> <p style="text-align: right;">Page 121</p>

<p>1 BY MS. McCALLION:</p> <p>2 Q. Do you recall when you got these flip</p> <p>3 charts, what years?</p> <p>4 A. Those, probably two or three years</p> <p>5 ago, the top one.</p> <p>6 Q. 11 and 12 --</p> <p>7 A. Yeah.</p> <p>8 Q. -- a few years ago?</p> <p>9 A. Yeah.</p> <p>10 Q. And then 13 is older?</p> <p>11 A. Definitely. Probably 10 years. And</p> <p>12 some of those, you know, kind of were used in the</p> <p>13 clinic at one point. The clinic has made a</p> <p>14 complete transition to no longer flip charts, but</p> <p>15 it's all digital.</p> <p>16 Q. Do you administer the King-Devick Test</p> <p>17 on an iPad currently in the lab?</p> <p>18 A. No.</p> <p>19 Q. No.</p> <p>20 A. We will, we will. But at this point</p> <p>21 this is what we have. But they will do that in</p> <p>22 the clinic when they get to the clinic, which will</p> <p style="text-align: right;">Page 130</p>	<p>1 Those are pretty much in the manual there.</p> <p>2 Q. Okay.</p> <p>3 A. Yeah. So you try to give exposure to</p> <p>4 what's clinically relevant today and by case</p> <p>5 examples to make it meaningful so that they can</p> <p>6 see a patient behind it, that there might be a</p> <p>7 patient that they would use this test on. So they</p> <p>8 make that connection. And that's the purpose at</p> <p>9 this point.</p> <p>10 Q. Right. It makes sense.</p> <p>11 MS. McCALLION: Well, I think we might</p> <p>12 be done.</p> <p>13 MR. KLUFT: Could we take a</p> <p>14 five-minute break?</p> <p>15 MS. McCALLION: Of course.</p> <p>16 MR. KLUFT: I just want to use the</p> <p>17 restroom, and we may have one or two questions.</p> <p>18 MS. McCALLION: Okay.</p> <p>19 MR. KLUFT: And we may have no</p> <p>20 questions but I just want to think through it.</p> <p>21 MS. McCALLION: Yeah, I want to do the</p> <p>22 same with Vivian. So we'll reconvene in five</p> <p style="text-align: right;">Page 132</p>
<p>1 be some of third year and their last year, the</p> <p>2 fourth year, yeah, because that's -- the clinic</p> <p>3 almost exclusively uses the digital and the iPad.</p> <p>4 Q. The King-Devick Test is in the clinic</p> <p>5 now --</p> <p>6 A. Yes.</p> <p>7 Q. -- in an electronic form.</p> <p>8 A. Yes.</p> <p>9 Q. Got it.</p> <p>10 A. And we have a new enormous renovation</p> <p>11 and expansion of our pediatric and binocular</p> <p>12 vision clinic where this is done and this is going</p> <p>13 to be all high-tech and state of the art. So we</p> <p>14 still deal with this in the lab sometimes.</p> <p>15 Q. Are the people in the lab also,</p> <p>16 they're administering other types of tests; right?</p> <p>17 A. Yes.</p> <p>18 Q. It's not limited to the King-Devick</p> <p>19 Test.</p> <p>20 A. Exactly.</p> <p>21 Q. What other types of tests do they use?</p> <p>22 A. Developmental eye movement tests.</p> <p style="text-align: right;">Page 131</p>	<p>1 minutes.</p> <p>2 THE VIDEOGRAPHER: We are now going</p> <p>3 off the record at 4:42 p.m.</p> <p>4 (A recess was taken.)</p> <p>5 THE VIDEOGRAPHER: We are now going</p> <p>6 back on the record at 4:52 p.m.</p> <p>7 BY MS. McCALLION:</p> <p>8 Q. Okay. Professor, we just have a few</p> <p>9 more questions. I think we're going to be done</p> <p>10 very soon.</p> <p>11 Have you ever heard of a company</p> <p>12 called the Illinois College of Optometry Press?</p> <p>13 A. It's not a company.</p> <p>14 Q. What is it?</p> <p>15 A. ICO Press?</p> <p>16 Q. Yes.</p> <p>17 A. That refers to things that have been</p> <p>18 printed in the prints room --</p> <p>19 Q. Okay.</p> <p>20 A. -- our printing department downstairs</p> <p>21 where we print all the lab manuals, the syllabi.</p> <p>22 And it used to refer to, like even the lab manual,</p> <p style="text-align: right;">Page 133</p>

<p>1 as ICO Press, which was not for public 2 distribution but it was more for stuff that was 3 done internally, for internal use. 4 Q. And so it wasn't a separate company? 5 It was just a division of the school? 6 A. We have a print room where we have -- 7 it's a combination of printing and a mailroom and 8 stuff like that. And so we have always had a way 9 to produce documents or manuals or syllabi, things 10 like that. And for a period of time we would, or 11 the institution would say ICO Press, meaning it 12 was done internally. It's not an external place. 13 It's just our copying system. And it was 14 basically for manuals, syllabi, you know, any 15 documents that we as faculty might have that we 16 want to distribute to the students. It was mainly 17 a method of designating stuff that was done on 18 site and would be provided for or available to our 19 student body. 20 Q. In copies? 21 A. Well, there it would be, you know, 22 mimeographed or whatever. What do you mean</p> <p style="text-align: right;">Page 134</p>	<p>1 document. It's something that we used earlier. 2 It's already marked. You don't have to mark it. 3 I'm just going to give you this copy of the 4 original, it's ICO 5. 5 I'll show you where I'm looking. 6 So the title, part of the title of the document is 7 I think the title of the senior paper; right? It 8 says "The proposed King-Devick" -- I'll use this 9 one and give you that one. (Document tendered to 10 the witness.) 11 So we pulled this, I'll represent 12 to you, we went on to the ICO library website and 13 we did a search for "King-Devick" and this is what 14 appeared. It has the title of the paper. Do you 15 see that title at the top, "The proposed"? 16 A. Uh-huh, yeah. 17 Q. And then a couple lines below it has 18 publication information, Illinois College of 19 Optometry Press. That's why I was asking you what 20 the press is or what it did. 21 A. Yeah. 22 Q. Do you know why the paper is</p> <p style="text-align: right;">Page 136</p>
<p>1 copied? 2 Q. So I guess I'm wondering what the -- 3 A. So let's say if you wanted 150 4 manuals, they would make 150 manuals. 5 Q. I see. So as a faculty member here 6 you would ask the press for copies of a certain 7 document, you would give them a certain number of 8 copies you wanted, and they would make you those 9 copies? 10 A. Assuming it was for a larger amount 11 than just a few. If it was just a few, you could 12 have your teaching assistant or you do it 13 yourself -- 14 Q. Right. 15 A. -- in the faculty office area. 16 So it wouldn't have to go through 17 the print room because then you have to, you know, 18 charge it to an account, you have to follow the 19 paperwork. And so many times if it's a small 20 number of copies that we want of something, we'll 21 just do it ourselves. 22 Q. Okay. So I want to show you this</p> <p style="text-align: right;">Page 135</p>	<p>1 affiliated with the press on this document? 2 MR. KLUFT: Objection, foundation. 3 THE WITNESS: Yeah, that, again, was 4 their way of designating that it was done 5 internally and it was done at the time that the 6 paper was apparently put into the stacks of the 7 library, as other senior projects were. 8 So there has never been an ICO 9 Press. It's just a way of designating us doing 10 internal printing or duplication or whatever for 11 student use. 12 BY MS. McCALLION: 13 Q. So does this indicate to you that the 14 senior paper was duplicated for third party use 15 or -- 16 A. No. 17 Q. -- student use? No? 18 A. Because it was not published, you 19 know, there was no publication or notice 20 profession-wise that this paper has been 21 published. 22 It was internal use. I think in</p> <p style="text-align: right;">Page 137</p>

<p>1 publications a key part of that has to do that 2 it's made available for public use, for possible 3 sale, or some other form of use, and that was 4 never the intent of this ICO Press. 5 So in the current I think the legal 6 definition of publication, that would be a 7 misnomer. That wouldn't mean that it was 8 published in the legal definition, as I understand 9 it. 10 Q. What's your understanding of the legal 11 definition? 12 A. That it's -- "publication" has a 13 technical meaning to copyright law. According to 14 the statute, publication is the distribution of 15 copies of a work to the public by sale or other 16 transfer of ownership or by rental, lease, or 17 lending. It was none of those. 18 Q. If I was a student here at the school 19 in 1977 and I went to the library and asked for a 20 copy of the King-Devick senior paper, could I have 21 gotten a copy? 22 MR. KLUFT: Objection, foundation.</p> <p style="text-align: right;">Page 138</p>	<p>1 Q. So at the time -- 2 A. From my experience, that didn't 3 happen. 4 Q. Just going back to the hypothetical I 5 was giving you earlier. So if I was a student 6 here in 1977 and I went to the library and asked 7 to see the King-Devick Test, I could have seen it 8 with my eyes. 9 A. Uh-huh. 10 MR. KLUFT: Objection, foundation. 11 THE REPORTER: Can you answer out 12 loud? 13 THE WITNESS: Yes. I'm not sure that 14 that happened. 15 BY MS. McCALLION: 16 Q. Right. Well, I also wasn't a student 17 here. And I was very young in 1977. 18 Do you know that the ICO library 19 had four copies of the King-Devick senior paper? 20 A. I've heard that statement. I have no 21 basis to say that it's correct or not. I just 22 heard in some of this discussion here and so forth</p> <p style="text-align: right;">Page 140</p>
<p>1 THE WITNESS: Most likely, no. 2 BY MS. McCALLION: 3 Q. Why not? 4 A. Because photocopying at that time was 5 very specific and mainly in the administrative 6 office. 7 Q. Did the administrative office have 8 photocopiers then? 9 A. Slow operating ones, yeah. But it 10 wasn't like, you know, you got a copier out here 11 that you've been using, you go there. And 12 sometimes students will do that. Actually in the 13 library they pay something for it. But there's 14 copiers like in administrative areas where, you 15 know, I can make a copy of something, as you did 16 today in our faculty area. 17 But at that time it was a big deal 18 for students to copy something out of the library 19 because it would be, you know, one sheet at a time 20 and you had to pay for it. For the most part it 21 was they would look at it. If they wanted to make 22 notes or whatever, they could do that.</p> <p style="text-align: right;">Page 139</p>	<p>1 that there were four copies. I'm not aware of 2 that. 3 Q. Okay. So you don't know when -- 4 A. I don't know. 5 Q. -- the four copies were made? 6 A. No. 7 Q. Okay. I have I think one last 8 question for you, which is with respect to 9 something that you brought today, which is -- 10 A. You know, like here, this monogram 11 that we talked about before, it says the 12 University of Chicago Press and this one here I 13 think is Berkeley Press or something. That's 14 something that some institutions have done when 15 they have something that they present like this 16 that you can buy or that you can arrange for 17 copies. 18 Here at this institution, not 19 currently being used, but in the past it was 20 anything that was made internally was ICO Press. 21 Q. Got it. 22 A. So that's different than what many</p> <p style="text-align: right;">Page 141</p>

<p>1 MR. KLUFT: Okay.</p> <p>2 MS. McCALLION: And, in particular, it</p> <p>3 came from reliability study of the Pierce and</p> <p>4 King-Devick saccade tests, which looks like it's</p> <p>5 from 1986.</p> <p>6 MR. KLUFT: Okay.</p> <p>7 MS. McCALLION: But I'll just put</p> <p>8 these two articles together in the last exhibit.</p> <p>9 The second article is the NYSOA K-D Test article</p> <p>10 that we were talking about earlier, which we all</p> <p>11 have any way, but just for purposes of clarity.</p> <p>12 (Deposition Exhibit 15 was marked</p> <p>13 for identification.)</p> <p>14 MS. McCALLION: And then I believe</p> <p>15 we're done.</p> <p>16 MR. KLUFT: I have a couple questions</p> <p>17 but not much.</p> <p>18 MS. McCALLION: Okay. Thank you very</p> <p>19 much, Professor.</p> <p>20 THE WITNESS: Thank you.</p> <p>21</p> <p>22</p> <p style="text-align: right;">Page 146</p>	<p>1 office and in the mailroom, yeah.</p> <p>2 Q. Okay. One other question. I think</p> <p>3 you testified when Ms. McCallion asked you if you</p> <p>4 knew when the first time you used the King-Devick</p> <p>5 Test as part of your lab classes. I think you</p> <p>6 testified that you didn't remember when was the</p> <p>7 first time you did that --</p> <p>8 A. Uh-huh.</p> <p>9 Q. -- correct?</p> <p>10 A. Yes.</p> <p>11 Q. Is it fair to say that it was at least</p> <p>12 sometime after the first version of the flip</p> <p>13 charts became available?</p> <p>14 A. Yes.</p> <p>15 MR. KLUFT: That's all I have.</p> <p>16 MS. McCALLION: Okay. Thank you.</p> <p>17 MR. KLUFT: Thank you very much.</p> <p>18 THE VIDEOGRAPHER: This concludes</p> <p>19 today's deposition. We're now going off the</p> <p>20 record at 5:09 p.m.</p> <p>21 (Said deposition was so concluded</p> <p>22 at 5:09 p.m.)</p> <p style="text-align: right;">Page 148</p>
<p>1 EXAMINATION</p> <p>2 BY MR. KLUFT:</p> <p>3 Q. Professor Schlange, again, my name is</p> <p>4 David Kluff, and I represent Steve Devick and</p> <p>5 King-Devick Test. I just have a couple questions</p> <p>6 before we let you go today.</p> <p>7 The Illinois College of Optometry</p> <p>8 Press, which we were talking about, I understand</p> <p>9 that those documents were produced in copy</p> <p>10 machines, at copy machines in the mailroom; is</p> <p>11 that correct?</p> <p>12 A. Say that again.</p> <p>13 Q. Well, let me put it another way. Is</p> <p>14 it fair to say the term "Illinois College of</p> <p>15 Optometry Press" is a term used internally to</p> <p>16 identify documents that were created on the copy</p> <p>17 machines in the mailroom?</p> <p>18 A. Yes, it would be in the mailroom,</p> <p>19 yeah. Normally it's, you know, mass production,</p> <p>20 but they don't do that anymore because of the</p> <p>21 accessibility of a lot of copiers. But at that</p> <p>22 time copiers were maybe in the administrative</p> <p style="text-align: right;">Page 147</p>	<p>1 STATE OF ILLINOIS)</p> <p>2 COUNTY OF C O O K)</p> <p>3 I, Donna M. Kazaitis, CRR, RPR, IL-CSR</p> <p>4 No. 084-003145, do hereby certify:</p> <p>5 That the foregoing deposition of DARRELL G.</p> <p>6 SCHLANGE, O.D. was taken before me at the time and</p> <p>7 place therein set forth, at which time the witness</p> <p>8 was put under oath by me;</p> <p>9 That the testimony of the witness and all</p> <p>10 objections made at the time of the examination</p> <p>11 were recorded stenographically by me, were</p> <p>12 thereafter transcribed under my direction and</p> <p>13 supervision and that the foregoing is a true</p> <p>14 record of same.</p> <p>15 I further certify that I am neither counsel</p> <p>16 for nor related to any party to said action, nor</p> <p>17 in any way interested in the outcome thereof.</p> <p>18 IN WITNESS WHEREOF, I have subscribed my name</p> <p>19 this 10th day of December, 2018.</p> <p>20</p> <p>21</p> <p>22</p> <p style="text-align: right;">Page 149</p>

EXHIBIT 4

<p>1 University, Steven Galetta, and Laura Balcer. And 2 also here is Kristen McCallion.</p> <p>3 MR. KLUFT: Good morning, Ms. Weber. 4 My name is David Kluff. And I'm from the law firm 5 of Foley Hoag in Boston, and I represent the 6 King-Devick Test, Inc. and Steve Devick. And 7 Dr. Devick is here with me today.</p> <p>8 THE VIDEOGRAPHER: Will the court 9 reporter please swear in the witness.</p> <p>10 MR. PERKINS: Floyd Perkins for 11 Illinois College of Optometry and the deponent. 12 (Witness sworn.)</p> <p>13 CHRISTINE WEBER, 14 having been first duly sworn, was examined and 15 testified as follows:</p> <p>16 EXAMINATION</p> <p>17 BY MS. CHENG:</p> <p>18 Q. Please state your name for the record. 19 A. My name is Christine Weber. 20 Q. Have you ever had your deposition 21 taken before? 22 A. No.</p> <p style="text-align: right;">Page 6</p>	<p>1 something like that, just let us know. I'd just 2 ask that you don't ask for a break while a 3 question is pending. Okay?</p> <p>4 A. Yes. 5 Q. If I ask you a question that you think 6 is unclear, will you let me know? 7 A. Yes. 8 Q. Because otherwise I will assume that 9 you've understood the question; is that fair? 10 A. Yes. 11 Q. Do you understand that you're under 12 oath today? 13 A. Yes. 14 Q. Is there any reason why you can't give 15 me full, complete answers and testify truthfully 16 today? 17 A. No. 18 Q. So I just want to go through some of 19 your background. So you are employed by the 20 Illinois College of Optometry; is that right? 21 A. Yes. 22 Q. What is your position here?</p> <p style="text-align: right;">Page 8</p>
<p>1 Q. So I'll just go through a few ground 2 rules so you can get a sense of what's going to 3 happen today.</p> <p>4 I'm going to ask you a series of 5 questions, and unless your attorney instructs you 6 you have to answer and give me a full, complete 7 answer. Will you do that? 8 A. Yes. 9 Q. And you understand that there's a 10 stenographer here and she is going to take down 11 everything that you say. So when I ask you 12 questions, I need a verbal response. 13 A. Okay. 14 Q. She can't record a shake of your head. 15 A. Okay. 16 Q. I'd just ask that you wait for me to 17 finish asking the question before you begin to 18 answer. Will you do that? 19 A. Yes. 20 Q. We can take breaks whenever you like. 21 This probably won't be very long. But, you know, 22 if you want to take a break once an hour or</p> <p style="text-align: right;">Page 7</p>	<p>1 A. I'm a senior director. 2 Q. What does a senior director do? 3 A. I have the library under me, so that's 4 my position. 5 Q. Do you -- 6 A. Director of the library. 7 Q. Do you work exclusively for the 8 library or also for the college itself? 9 A. I work for the college but I am the 10 library director. 11 Q. And how -- 12 A. My position title is senior director. 13 Q. And how long have you worked at the 14 library? 15 A. Six and a half years. 16 Q. And were you senior director for all 17 of those six and a half years? 18 A. No. 19 Q. So before you became a senior 20 director, what was your title before then? 21 A. Director. 22 Q. And when did you become a director?</p> <p style="text-align: right;">Page 9</p>

<p>1 you know, it varies. We have between probably 130 2 to 160 in each of the classes. It depends on the 3 year and the enrollment for that particular year.</p> <p>4 Q. Do you know how many students attended 5 ICO in the late '70s or early '80s for one year 6 about?</p> <p>7 A. I have no idea.</p> <p>8 Q. Is the library on campus?</p> <p>9 A. Yes. It's directly underneath us.</p> <p>10 Q. How big is the library?</p> <p>11 A. I can't tell you the exact square 12 footage, but there's a second floor which is right 13 behind us and then a downstairs area.</p> <p>14 Q. So it's two floors?</p> <p>15 A. Yes.</p> <p>16 Q. And what type of resource materials 17 are available in the library?</p> <p>18 A. Basic optometry and ophthalmology, 19 some medical materials.</p> <p>20 Q. What are those materials? Like</p> <p>21 textbooks, journals?</p> <p>22 A. Both.</p> <p style="text-align: right;">Page 34</p>	<p>1 If they need access, they're certainly welcome to 2 come in.</p> <p>3 We also belong to a consortia 4 called CARLI, C-A-R-L-I, which is the Consortia of 5 Academic and Research Libraries of Illinois. So 6 as a member of that consortia, we are obligated to 7 open our doors to any CARLI member who chooses to 8 come in. But they still have to go through us and 9 through security to make sure that they can come 10 in through the doors.</p> <p>11 Q. So who are the other members of CARLI? 12 Are they other colleges in Illinois?</p> <p>13 A. Yes, colleges and universities.</p> <p>14 Q. Do you know which colleges and 15 universities those are?</p> <p>16 A. There are 92 of them, so I really 17 can't name them all.</p> <p>18 Q. So if anyone from any of those 92 19 colleges or universities requested access to the 20 library, you would be the one to give them access?</p> <p>21 A. Yes. It's very rare. We hardly ever 22 have anyone come in.</p> <p style="text-align: right;">Page 36</p>
<p>1 Q. What else is in the library other than 2 textbooks and journals?</p> <p>3 A. That's pretty much it. I mean we 4 offer a wide suite of electronic resources. So 5 there are also things available via the library 6 website which are electronic, digital resources.</p> <p>7 Q. So who has access to the library 8 website to get those materials?</p> <p>9 A. Just our students, faculty, and staff.</p> <p>10 Q. So you have to be an enrolled student?</p> <p>11 A. Correct, or a faculty or staff member.</p> <p>12 Q. Who has access to the library 13 generally?</p> <p>14 A. It's a closed facility. So only our 15 students, faculty, and staff.</p> <p>16 Q. Has it always been a closed facility?</p> <p>17 A. Yes.</p> <p>18 Q. So if someone from the general 19 public couldn't just walk in and --</p> <p>20 A. No, they can't. If they need to come 21 in and do some research, they can make a request 22 to us, and then that generally comes through me.</p> <p style="text-align: right;">Page 35</p>	<p>1 Q. Are there records of those requests?</p> <p>2 A. No.</p> <p>3 Q. Do you know when ICO joined the CARLI, 4 that consortium?</p> <p>5 A. I don't.</p> <p>6 Q. Is that something you can find out?</p> <p>7 A. That predated me. I can call them and 8 find out, but I don't know.</p> <p>9 Q. Can anyone who's say, for example, a 10 researcher from outside of Illinois not part of 11 this consortium, could they ask you for access to 12 the library?</p> <p>13 A. Yes.</p> <p>14 Q. And would you generally grant that 15 access?</p> <p>16 A. It would depend on who it was.</p> <p>17 Q. What would it depend on?</p> <p>18 A. It would depend on the kind of 19 research that they're doing and whether it's 20 optometry and ophthalmology related.</p> <p>21 But I mean, again, I can probably 22 count on less than two fingers how many requests</p> <p style="text-align: right;">Page 37</p>

<p>1 we've had for people to come in since I've been 2 here. 3 Q. Have you ever denied a request -- 4 A. No. 5 Q. -- for access? 6 A. Because, again, it's rare. 7 And generally it's our alumni who 8 request access. You know, they still have to 9 request to come in and use the material because we 10 don't open -- we don't borrow, allow things -- we 11 don't allow our alumni to borrow things just 12 willie-nillie. You know, they've got to come in 13 and make a request to us. 14 Q. So let's talk about the borrowing 15 policies. Is there a policy for who can borrow 16 materials out of the library? 17 A. Yes. 18 Q. What is that policy? 19 A. Faculty, staff, and students. 20 Q. How long can they take materials out 21 for? 22 A. Two weeks, unless it's a reserve. If</p> <p style="text-align: right;">Page 38</p>	<p>1 name of the organization. 2 Q. Was it around in the late '70s, early 3 '80s? 4 A. Not as RAILS, but yes, it was. 5 Q. What was it called back then? 6 A. As I mentioned, South Suburban Library 7 System. 8 Q. Is there a librarian who is in charge 9 of taking care of the interlibrary loans? 10 A. Yes. As I mentioned, Sandra Engram. 11 Q. Do you know who that was in the '70s, 12 early '80s? 13 A. I don't. I don't think Sandra was 14 here at that time. 15 Q. Do you know someone who could help you 16 find out who was in charge of the interlibrary 17 loans? 18 A. Probably Gerry would know. I'm not 19 sure though if he was even here then. I mean all 20 of this is predating me, so I just don't have that 21 information. 22 Q. Do you know how many other</p> <p style="text-align: right;">Page 40</p>
<p>1 it's a reserve, it's three hours. 2 Q. And can they take the reserve 3 materials out of the library within those three 4 hours? 5 A. Yes, they can. 6 We also have interlibrary loans, 7 which I mentioned that Sandra does. So if people 8 request to borrow something through interlibrary 9 loan, then we will send it out and have the 10 borrower return it to us. 11 Q. What is the interlibrary loan program? 12 A. It's through a consortia called RAILS, 13 R-A-I-L-S, and it's a document delivery service. 14 We belong to the consortia. People request 15 things. If there's something that we feel is okay 16 to lend out, then we'll lend it to people and have 17 them send it back to us when they're done. 18 Q. Do you know how long the college has 19 been part of this RAILS service? 20 A. Forever. I mean a long time. It's 21 been around for a long time. It was formerly 22 South Suburban Library System I believe was the</p> <p style="text-align: right;">Page 39</p>	<p>1 organizations are part of that RAILS consortium? 2 A. Most of the public and academic 3 libraries in the Chicagoland area. 4 Q. So when requests are made for 5 materials from nonstudents and nonfaculty, someone 6 from outside the college, how long can they borrow 7 the material for? 8 A. Via interlibrary loan? 9 Q. Yes. 10 A. I think it depends on the 11 organization. We have reciprocal borrowing with 12 some of the organizations and not with others. So 13 I'm not really sure what Sandra's rules are for 14 those. I mean she does that; I don't. She would 15 know more than I. 16 Q. Is there a written policy on how long 17 certain schools could -- 18 A. Yes. 19 Q. -- take them out for? 20 A. Yes. 21 Q. Do you have that written policy in 22 some of the library's files?</p> <p style="text-align: right;">Page 41</p>

<p>1 A. Yes.</p> <p>2 Q. Would you be able to get that for us?</p> <p>3 A. Yes.</p> <p>4 But we don't lend our reserve</p> <p>5 materials out. Just to qualify that. So anything</p> <p>6 that's on reserve we don't lend, because it's</p> <p>7 really generally there for her students to use.</p> <p>8 Q. So if a book or a paper were on</p> <p>9 reserve, that would mean that you can't then check</p> <p>10 it out of the library, you can only use it for</p> <p>11 three hours within the library?</p> <p>12 A. The students can take it out of the</p> <p>13 library, the faculty could take it out of the</p> <p>14 library, but we do not interlibrary loan those</p> <p>15 materials.</p> <p>16 Q. What if there's more than one copy of</p> <p>17 the material, say it's an article and there's five</p> <p>18 copies of it, would you be able to interlibrary</p> <p>19 loan one of those copies even though it's on</p> <p>20 reserve?</p> <p>21 A. No. Again, we don't lend those out if</p> <p>22 they're on reserve. We don't lend them out</p> <p style="text-align: right;">Page 42</p>	<p>1 A. Yes.</p> <p>2 MR. KLUFT: Object -- I'm sorry.</p> <p>3 Register my objection to the form only as to lack</p> <p>4 of a time period.</p> <p>5 BY MS. CHENG:</p> <p>6 Q. Do you know when the library first had</p> <p>7 a photocopy machine?</p> <p>8 A. I do not.</p> <p>9 Q. Do you know whether there was a</p> <p>10 photocopy machine in the late '70s, early '80s?</p> <p>11 A. I do not.</p> <p>12 Q. Who would know that?</p> <p>13 A. Again, you know, the previous director</p> <p>14 died who was here at that time. I don't know if</p> <p>15 Gerry was here then or not.</p> <p>16 Q. Does the library currently have a</p> <p>17 policy about making photocopies?</p> <p>18 A. The students have a card that they</p> <p>19 use, and they can make copies of anything that</p> <p>20 they want as long as it falls within the copyright</p> <p>21 guidelines.</p> <p>22 We don't dictate that. I mean we</p> <p style="text-align: right;">Page 44</p>
<p>1 outside of the college.</p> <p>2 Q. So if someone from outside the college</p> <p>3 wanted to just take a look at something that's on</p> <p>4 reserve, they would have to come to the library to</p> <p>5 look at it?</p> <p>6 MR. KLUFT: Object to --</p> <p>7 THE WITNESS: Yeah, but I mean that's</p> <p>8 not something we would generally do.</p> <p>9 BY MS. CHENG:</p> <p>10 Q. Why is that?</p> <p>11 A. Because I don't -- people just don't</p> <p>12 do that. I mean they don't come in here for that</p> <p>13 reason. It's really a closed facility.</p> <p>14 As I mentioned, there's probably</p> <p>15 two requests that I've had that I've been here the</p> <p>16 past six and a half years for people to come in</p> <p>17 and take a look at what we have. And usually they</p> <p>18 were alumni who were doing research on</p> <p>19 ophthalmology or optometry.</p> <p>20 Q. So the students and faculty at the</p> <p>21 college, are they allowed to make photocopies of</p> <p>22 the materials in the library?</p> <p style="text-align: right;">Page 43</p>	<p>1 don't stand over the copier and see what they're</p> <p>2 actually photocopying, but they have so much money</p> <p>3 that's loaded onto their card and then they just</p> <p>4 do what they need to do for classes.</p> <p>5 Q. Is the --</p> <p>6 A. I generally do tell them that we like</p> <p>7 them to keep copies limited to less than 10 in the</p> <p>8 library.</p> <p>9 Q. The copyright guidelines, is that a</p> <p>10 document?</p> <p>11 A. No. We do not have -- we just have</p> <p>12 links on our website to copyright policies which</p> <p>13 are the Copyright Clearinghouse and things like</p> <p>14 that. I'm not the copyright police in the</p> <p>15 library.</p> <p>16 Q. Do you know how long those copyright</p> <p>17 guidelines have been online on the website?</p> <p>18 A. We brought a new website up in 2016,</p> <p>19 so ever since that period of time.</p> <p>20 Q. So before there was this new website,</p> <p>21 were prior policies saved somewhere in the library</p> <p>22 or with the administration?</p> <p style="text-align: right;">Page 45</p>

<p>1 were in a big microfilm, or a big cabinet, and 2 those were the ones that were shredded. 3 Q. And this was in the old library before 4 2014 -- 5 A. Yes, uh-huh. 6 Q. -- that they were in a specific 7 cabinet? 8 A. Yes. 9 Q. Was that the equivalent of being, you 10 know, behind the circulation desk like you 11 mentioned, the papers being on reserve? 12 MR. KLUFT: Objection. Object to the 13 form as vague, but you can answer. 14 THE WITNESS: I'm sorry. Would you 15 restate that question? 16 MS. CHENG: Sure. 17 BY MS. CHENG: 18 Q. You mentioned that the senior projects 19 were kept in a cabinet in the old library prior to 20 2014. 21 A. Uh-huh. 22 Q. What was that -- why were they kept in</p> <p style="text-align: right;">Page 50</p>	<p>1 those also cataloged in the library's materials? 2 A. They were. When we moved, we 3 discarded them. We removed them from the catalog 4 and we sent everything that we discarded to our 5 business office, so that they could add that to 6 the assets list of things that were discarded. So 7 the business office should have a list of 8 everything that we discarded from the library. 9 Q. Are there old records of the library 10 catalog before the move? So would you have 11 records of what was in the library in a certain 12 year? 13 A. What we would have is the current 14 catalog which is what we have right now. Anything 15 that was discarded is out of the catalog. 16 Q. I understand. So -- 17 A. But we did provide that list to the 18 business office of things we discarded. 19 Every time we discard -- for 20 instance, we just discarded all of our CDs and 21 DVDs because we don't use them anymore. When we 22 do that, they're not in the current catalog and</p> <p style="text-align: right;">Page 52</p>
<p>1 a cabinet? 2 A. Because when I came, they were in a 3 cabinet. They were in a cabinet. The cabinet was 4 locked. You know, if people wanted them, we got 5 them out. 6 But, to my knowledge, no one ever 7 checked any of them out, and they were just kind 8 of sitting there. And they had been there for 9 years and years and years. 10 I mean we went through a really 11 judicious process when we moved because we lost 25 12 percent of our space. So we had to think about 13 what we were keeping, what we were weeding, what 14 was taking up space that we didn't have anymore. 15 And that was one thing that we were told to get 16 rid, so we did. 17 Q. Before the library moved in 2014, was 18 there a library catalog of all the materials that 19 were in the library then? 20 A. Yes, it's the same catalog. 21 Q. Same catalog. So were those senior 22 projects that were locked in the cabinet, were</p> <p style="text-align: right;">Page 51</p>	<p>1 the business office has a list of those things. I 2 send them to the business office every time we 3 discard things. 4 Q. Is there a particular contact in the 5 business office that you have? 6 A. The person I usually send them to is 7 Mary Ryberg, R-Y-B-E-R-G. 8 Q. Why does the library -- or, why did 9 the library keep senior projects? 10 A. I don't know. 11 Q. Do you know who would know? 12 A. I don't know how long -- you know, 13 again they're discarded. So I don't know if they 14 were from 1929 and 1930 or 1970. You know, I have 15 no idea. So I don't know why they were kept or 16 why they were in the cabinet. I mean I don't have 17 any idea. They were just here when I arrived. 18 And, again, I've only been year six and a half 19 years. 20 Q. So currently does the library keep any 21 copies of student papers? 22 A. No. I don't even know that students</p> <p style="text-align: right;">Page 53</p>

<p>1 write papers anymore. I'm not really sure. I</p> <p>2 know they do a Capstone project in their fourth</p> <p>3 year, but I don't know where they live or where</p> <p>4 they are.</p> <p>5 MS. CHENG: I'm going to mark this as</p> <p>6 ICO 3.</p> <p>7 (Deposition Exhibit 3 was marked</p> <p>8 for identification.)</p> <p>9 BY MS. CHENG:</p> <p>10 Q. Please take a look at ICO 3 and let me</p> <p>11 know if you know what this is. (Document tendered</p> <p>12 to the witness.)</p> <p>13 A. Uh-huh, I do know what it is.</p> <p>14 Q. What is it?</p> <p>15 A. It's a reserve list that I provided to</p> <p>16 Dr. Conrad when she asked for it.</p> <p>17 Q. So how was this reserve list</p> <p>18 generated? Is it a database?</p> <p>19 A. I think I mentioned that we flag the</p> <p>20 reserve materials in our integrated library</p> <p>21 system. This is a report from the reserve list.</p> <p>22 It's a report of the reserve list.</p> <p style="text-align: right;">Page 54</p>	<p>1 was in 2014?</p> <p>2 A. Well, it went on for six months, so it</p> <p>3 was most of the year. We spent two years</p> <p>4 preparing for the move. We were weeding, we were</p> <p>5 moving, you know, getting rid of furniture. It</p> <p>6 was a lot. We were pretty overwhelmed, as you can</p> <p>7 imagine.</p> <p>8 Q. Sure.</p> <p>9 So looking at ISO 3, just looking</p> <p>10 at the very top of the page where it says "Reserve</p> <p>11 Usage Stats."</p> <p>12 A. Uh-huh.</p> <p>13 Q. What are reserve usage stats?</p> <p>14 A. That's how many times that particular</p> <p>15 material was checked out, by anyone, by students,</p> <p>16 faculty. So if it says 0, it was never checked</p> <p>17 out.</p> <p>18 Q. So you're looking at the far right</p> <p>19 column?</p> <p>20 A. Correct.</p> <p>21 Q. So if it says 0, this would mean, for</p> <p>22 example, just the first one, "The Massachusetts</p> <p style="text-align: right;">Page 56</p>
<p>1 Q. So I see that there are some years</p> <p>2 here. Summer 2014. Is that the -- that's the</p> <p>3 semester for that, you know, on the first page for</p> <p>4 that reserve list?</p> <p>5 A. Yes.</p> <p>6 Q. And just flipping through the back --</p> <p>7 and you can go through each page if you'd like --</p> <p>8 I see there is dates for 2014, 2016, and 2017.</p> <p>9 A. Yes.</p> <p>10 Q. Is there a reason why there's no</p> <p>11 record for 2015?</p> <p>12 A. I don't really know. I asked Grahm to</p> <p>13 run the list for me and I don't know why 2015</p> <p>14 isn't in there. It wasn't an oversight -- I mean</p> <p>15 it was probably just an oversight on our part and</p> <p>16 I apologize for that. There's no particular</p> <p>17 reason that 2015 isn't in there.</p> <p>18 It may have been that that's when</p> <p>19 we, right after we moved and, you know, maybe</p> <p>20 things just got a little chaotic during that</p> <p>21 period of time.</p> <p>22 Q. Do you remember what month the move</p> <p style="text-align: right;">Page 55</p>	<p>1 Eye and Ear," this was a book or something that</p> <p>2 the professor put on the list but 0 means that no</p> <p>3 students checked it out?</p> <p>4 A. Right.</p> <p>5 So if you look down at the bottom</p> <p>6 of that column, you'll see that the "Clinical</p> <p>7 management of" I think binocular vision, is what</p> <p>8 the title is that was checked out twice.</p> <p>9 Q. And that's just for that one semester,</p> <p>10 the summer of --</p> <p>11 A. Right.</p> <p>12 Q. -- 2014 semester?</p> <p>13 A. Right.</p> <p>14 Q. Then the numbers in the far left</p> <p>15 column, what are those numbers?</p> <p>16 A. That's the call number. That's how we</p> <p>17 identify the book. It's a label that's on the</p> <p>18 bottom of the spine of the book and it's how the</p> <p>19 students and whoever is checking out the book is</p> <p>20 able to identify that particular book. So it</p> <p>21 corresponds to the call number which is --</p> <p>22 Q. So you're pointing to ICO 2?</p> <p style="text-align: right;">Page 57</p>

<p>1 to photocopy them and send them on. So if someone 2 asks for an article request, we would do that. 3 But we would never photocopy an entire book and 4 send it on to someone. 5 MS. CHENG: Can we mark this as ICO 5. 6 (Deposition Exhibit 5 was marked 7 for identification.) 8 BY MS. CHENG: 9 Q. So I've handed you what's been marked 10 as ICO 5. (Document tendered to the witness.) 11 A. Uh-huh. 12 Q. Let me know if you recognize this. 13 MR. KLUFT: Can I ask a question off 14 the record for a second? 15 (Brief pause.) 16 THE WITNESS: This is the record that 17 we would have had in our catalog prior to 18 withdrawing it. 19 So if you see the top half of the 20 page, it's the bibliographic record that's 21 attached to, that's actually in our integrated 22 library system. And then the bottom part are the</p> <p style="text-align: right;">Page 66</p>	<p>1 the bibliographic record, it says "Senior Project 2 1976." 3 Q. So do you see under "Publication 4 Information" a couple lines up it says "Illinois 5 College of Optometry Press 1976"? 6 A. I do see that. 7 Q. What is the Illinois College of 8 Optometry Press? 9 A. I have no idea. 10 Q. Had you ever heard of it before today? 11 A. I have not. Again, this is 1976. I 12 mean we have a print room downstairs. This isn't 13 the University of Chicago where we have the 14 University of Chicago Press. I mean we don't have 15 anything like that in the institution that I'm 16 aware of. So I don't really know what that means. 17 And I didn't put this record in the database, so I 18 have no idea. It was probably put in in 1976. 19 Q. So this computerized database you 20 think was around in 1976 or some form of it? 21 A. As I mentioned, it was this VALPAL 22 system.</p> <p style="text-align: right;">Page 68</p>
<p>1 item records which are the four copies that we had 2 in the collection under the reserve list. And 3 these have all been withdrawn from the collection. 4 So if we go into the catalog right 5 now, this would not be here because it's been 6 discarded. 7 Q. Were the copies discarded or were 8 they -- 9 A. Well, they were discarded from our 10 collection, but they were given to Dr. Devick per 11 his request. 12 Q. Do you remember when that was? 13 Approximately. It doesn't need to be an exact 14 date. 15 A. I'm not sure I have that information. 16 Whenever he asked me for it. Let's see if I can 17 find it. May of 2018. And we sent this via UPS 18 to his office. 19 Q. Okay. So looking at ICO 5, is this 20 the King and Devick senior paper that we've been 21 talking about today? 22 A. Yes. If you look at general note on</p> <p style="text-align: right;">Page 67</p>	<p>1 Q. Right. 2 A. I mean the '70s didn't have automated 3 integrated library systems. It was card catalogs. 4 So whoever cataloged this, it was probably in the 5 card catalog cataloged that way and then it was 6 just transferred into the integrated library 7 systems. Integrated library systems didn't come 8 in until the mid '80s, so it was all the card 9 catalog. 10 Q. Sure. So do you know whether the 11 library kept any old card catalogs in its archives 12 or anything like that? 13 A. No. Those have all been tossed away 14 is my understanding. We use those cards now as 15 scrap paper. 16 Q. I've seen that before. 17 A. That's how our students scribble their 18 notes and things. I mean it's -- no one has card 19 catalogs anymore. 20 MS. McCALLION: The Dewey decimal 21 system. 22</p> <p style="text-align: right;">Page 69</p>

<p>1 BY MS. CHENG:</p> <p>2 Q. So you mentioned before the University</p> <p>3 of Chicago Press, you understood that that was</p> <p>4 a --</p> <p>5 A. It's a physical entity.</p> <p>6 Q. Right. And so here you're not aware</p> <p>7 of the Illinois College of Optometry Press has</p> <p>8 something similar to that?</p> <p>9 A. No. I'm not aware of anything like</p> <p>10 that, no. We have a print room downstairs. You</p> <p>11 can see this is a one-building standalone campus.</p> <p>12 I mean it's not the University of Chicago.</p> <p>13 So whoever cataloged this, that's</p> <p>14 how they cataloged it. I didn't do this and I</p> <p>15 don't know why it was done this way, unless that's</p> <p>16 how they did all the student projects at the time.</p> <p>17 Q. So just looking at the second half of</p> <p>18 ICO 5, what are the item bar codes?</p> <p>19 A. That's how we check out books. We put</p> <p>20 a bar code in the back of the book, and our</p> <p>21 automated system checks the books out using that</p> <p>22 bar code. So the bar code is connected to the</p> <p style="text-align: right;">Page 70</p>	<p>1 bar code.</p> <p>2 Q. Do you know when the library first got</p> <p>3 this first copy? I think bar code number 113745?</p> <p>4 A. I have no idea.</p> <p>5 Q. Do you know when the library got these</p> <p>6 additional three copies underneath?</p> <p>7 A. I have no idea.</p> <p>8 Q. Did you see any of these four copies</p> <p>9 recently?</p> <p>10 MR. KLUFT: Object to the form.</p> <p>11 THE WITNESS: In 2018 May, yes,</p> <p>12 because I personally had them discarded from our</p> <p>13 library system and had them UPS'd to Dr. Devick</p> <p>14 per his request.</p> <p>15 BY MS. CHENG:</p> <p>16 Q. Did all four copies look the same?</p> <p>17 A. Yes.</p> <p>18 Q. What did they look like?</p> <p>19 A. They were just paper student copies.</p> <p>20 I mean they were kind of -- I don't know. I don't</p> <p>21 even remember if they were spiral bound or, you</p> <p>22 know, what, but they were just paper copies of the</p> <p style="text-align: right;">Page 72</p>
<p>1 patron ID and that's how the system recognizes the</p> <p>2 fact that a patron has something checked out.</p> <p>3 Q. So the patron ID would match up with a</p> <p>4 student's name or --</p> <p>5 A. Correct.</p> <p>6 Q. -- faculty?</p> <p>7 A. Correct.</p> <p>8 And that's why people don't check</p> <p>9 things out anywhere else. That's why people other</p> <p>10 than staff and faculty and students don't check</p> <p>11 things out because they don't have an ID with a</p> <p>12 bar code on it, with the exception of the</p> <p>13 interlibrary loan.</p> <p>14 Q. So it looks like this record is</p> <p>15 showing there are four copies of this senior</p> <p>16 project; is that right?</p> <p>17 A. There were four copies, yes, on</p> <p>18 reserve.</p> <p>19 Q. And each of the four copies had their</p> <p>20 own bar code.</p> <p>21 A. Correct, because each of the</p> <p>22 individual items has to have its own individual</p> <p style="text-align: right;">Page 71</p>	<p>1 projects.</p> <p>2 Q. Was there a cover on them --</p> <p>3 A. It wasn't a hard -- a soft cover, yes.</p> <p>4 Q. It was a soft cover?</p> <p>5 A. Yes. It wasn't a hardbound book or</p> <p>6 anything like that. If I remember correctly, and</p> <p>7 I might be misremembering this, I think the covers</p> <p>8 were blue, but I'm not sure.</p> <p>9 Q. Can you remember in the last three</p> <p>10 years who has requested copies of this senior</p> <p>11 paper?</p> <p>12 MR. KLUFT: Object to the form. You</p> <p>13 can answer.</p> <p>14 THE WITNESS: Based on this</p> <p>15 statistics, no one.</p> <p>16 BY MS. CHENG:</p> <p>17 Q. You're saying no one has actually</p> <p>18 gotten a copy of each of these four papers?</p> <p>19 A. Correct, no one's checked them out.</p> <p>20 Q. Do you recall anyone requesting to see</p> <p>21 a copy of this paper?</p> <p>22 A. We had several law firms requesting</p> <p style="text-align: right;">Page 73</p>

<p>1 If you look in Exhibit 5 where it 2 says "Staff View," I would be able to go into that 3 and see potentially in the past few years how much 4 the book costs and when it was acquired. 5 In this particular one I'm not 6 seeing that. So I'm thinking that this is 7 something that's coming from EBSCO, which is one 8 of our electronic aggregators. And I think that 9 this is probably something that we got from them 10 somehow. I'm not sure. 11 Q. So it would be an electronic record. 12 A. Maybe. 13 MS. CHENG: Why don't we go off the 14 record for a moment. 15 THE VIDEOGRAPHER: We are going off 16 the record at 10:59 a.m. 17 (Brief pause.) 18 THE VIDEOGRAPHER: We are now going 19 back on the record at 11:00 a.m. 20 MS. CHENG: No further questions from 21 us. 22</p> <p style="text-align: right;">Page 78</p>	<p>1 A. It hasn't been happening since I've 2 been here. 3 Q. And you have no record, isn't it true, 4 of anyone ever taking the copy of the King-Devick 5 Test from that filing cabinet and borrowing it or 6 looking at it; is that correct? 7 A. No, because they would have had to go 8 through us to do that because it was a locked 9 cabinet. So we would have had to open the cabinet 10 and give it to them. 11 Q. And you have no record of that 12 occurring before your time even; correct? 13 A. No, I mean how would I know that? 14 Q. And you mentioned the copies on 15 reserve. I think you indicated that the copies 16 were, four copies, were already on reserve when 17 you arrived; correct? 18 A. Correct. 19 Q. And you don't know when they were put 20 on reserve; is that right? 21 A. I do not. 22 Q. And you don't know who put them on</p> <p style="text-align: right;">Page 80</p>
<p>1 EXAMINATION 2 BY MR. KLUFT: 3 Q. Ms. Weber, I have a couple questions 4 to ask you. Again, my name is David Klufft, and I 5 represent King-Devick Test in this litigation. 6 When you got here to the ICO and 7 took up your position in 2012, do you know how 8 many copies of the King-Devick student paper were 9 in the library? 10 A. I believe there were four on reserve 11 and one in the student projects file. 12 Q. And the student projects file, you 13 described that as a locked filing cabinet? 14 A. Correct. 15 Q. And your understanding was that the 16 school collected as a matter of course all student 17 papers; is that right? 18 A. In the past. I don't -- 19 Q. In the past. 20 A. -- believe that's been happening 21 recently. 22 Q. Okay.</p> <p style="text-align: right;">Page 79</p>	<p>1 reserve except based on your -- well, withdraw the 2 question. 3 Your understanding is that 4 Dr. Schlange put them on reserve; correct? 5 A. Correct. 6 Q. Okay. 7 A. I would assume that. I mean he's 8 teaching that class, the BVS 244. So I would 9 assume that since that was associated, that 10 King-Devick was associated with that class, it 11 would be that he put them on reserve, but I don't 12 know for a fact. 13 Q. And you mentioned a couple of 14 interlibrary loan systems that you're a part of. 15 One is called RAILS? 16 A. That's our document delivery system. 17 Q. Document delivery system. 18 A. Uh-huh. 19 Q. And you said that -- and that 20 became -- that was formerly something called the 21 South Suburban System? 22 A. Correct.</p> <p style="text-align: right;">Page 81</p>

<p>1 is 1976, that it would have been converted in 1999</p> <p>2 but I don't know that for a fact.</p> <p>3 Q. Okay. And you don't actually know</p> <p>4 whether or not this paper was published by an</p> <p>5 entity called the Illinois College of Optometry</p> <p>6 Press?</p> <p>7 A. No idea.</p> <p>8 Q. And you don't even know if there ever</p> <p>9 was such an entity called the Illinois College of</p> <p>10 Optometry --</p> <p>11 A. No idea --</p> <p>12 Q. -- Press; isn't that correct?</p> <p>13 A. This is knowledge --</p> <p>14 Q. Sorry. Let me just repeat it again</p> <p>15 and make sure the record is clear.</p> <p>16 You don't know, in fact, whether</p> <p>17 there ever was an entity called the Illinois</p> <p>18 College of Optometry Press; is that correct?</p> <p>19 A. That's correct.</p> <p>20 Q. Did you have something else to say</p> <p>21 about that?</p> <p>22 A. This is the first time I've even ever</p> <p style="text-align: right;">Page 86</p>	<p>1 THE WITNESS: We were actually</p> <p>2 thinking about digitizing the student papers to</p> <p>3 save space, and that's where we got into the</p> <p>4 intellectual property decision and were told by</p> <p>5 Dr. Conrad that that wasn't possible unless we</p> <p>6 went back to every single student and received</p> <p>7 their permission to digitize that material. So we</p> <p>8 didn't.</p> <p>9 BY MR. KLUFT:</p> <p>10 Q. And, in fact, up to that time in 2009,</p> <p>11 as far as you know, you didn't have the</p> <p>12 permissions of the individual students who wrote</p> <p>13 those papers; correct?</p> <p>14 A. We did not, which is why we didn't</p> <p>15 digitize them.</p> <p>16 Q. And that included the King-Devick</p> <p>17 student paper; correct?</p> <p>18 A. If that was part of the student</p> <p>19 papers, yes.</p> <p>20 Q. I'm showing you a document that's been</p> <p>21 labeled ICO 7. It is a document that was produced</p> <p>22 by your attorney in this case. (Document tendered</p> <p style="text-align: right;">Page 88</p>
<p>1 seen this.</p> <p>2 Q. Do you have an understanding of the</p> <p>3 Illinois College of Optometry's policy on the</p> <p>4 ownership of student papers currently?</p> <p>5 A. My understanding from Dr. Conrad at</p> <p>6 the time that we were shredding the papers was</p> <p>7 that intellectual property policy -- the ICO</p> <p>8 intellectual property policy wasn't implemented</p> <p>9 until 2009, and after 2009 the intellectual</p> <p>10 property is owned by the college. That's my</p> <p>11 understanding from speaking with her, but I've</p> <p>12 never seen the policy.</p> <p>13 Q. And is it, in fact, your understanding</p> <p>14 that student papers from before 2009, say from</p> <p>15 1976, are owned by the students; is that correct?</p> <p>16 A. That's my understanding.</p> <p>17 MR. KLUFT: I'm going to ask that we</p> <p>18 mark an exhibit -- ICO 6 I think it's going to be?</p> <p>19 THE REPORTER: 7.</p> <p>20 MR. KLUFT: Oh, I'm sorry.</p> <p>21 (Deposition Exhibit 7 was marked</p> <p>22 for identification.)</p> <p style="text-align: right;">Page 87</p>	<p>1 to the witness.)</p> <p>2 I'm just going to ask you to take a</p> <p>3 quick look at it. It's an email, so it probably</p> <p>4 makes sense to start from the back and then read</p> <p>5 from the first email towards the front of the</p> <p>6 document.</p> <p>7 A. Uh-huh. That's all true that I wrote</p> <p>8 all of that.</p> <p>9 Q. You've anticipated my question. So</p> <p>10 why don't you finish reading the document and</p> <p>11 here's my question I'm going to ask you so we can</p> <p>12 get a clear record of it: Is there anything you</p> <p>13 wrote in this email that is not true or that you</p> <p>14 have learned is not true since writing it?</p> <p>15 A. Nope. We sent the four copies back.</p> <p>16 That's the only thing that I would state.</p> <p>17 Q. And you mentioned that Dr. Devick</p> <p>18 asked you for four copies. It indicates here</p> <p>19 that -- well, did he initially ask for all four</p> <p>20 copies or did he initially only ask for two?</p> <p>21 A. He asked for two.</p> <p>22 Q. Okay. And then why was it that you</p> <p style="text-align: right;">Page 89</p>

<p>1 ultimately gave him four?</p> <p>2 A. Because we just didn't want to deal</p> <p>3 with it. I mean it was --</p> <p>4 Q. Because lawyers were involved;</p> <p>5 correct?</p> <p>6 A. It was complicated and we wanted him</p> <p>7 to have what he wanted, so we sent them back.</p> <p>8 Q. So Dr. Devick, in fact, did not ask</p> <p>9 for all copies from the library; he only --</p> <p>10 A. Correct, he asked for two.</p> <p>11 MR. KLUFT: Did you get that? Let me</p> <p>12 ask one more time just in case.</p> <p>13 BY MR. KLUFT:</p> <p>14 Q. So Dr. Devick did not ask for all of</p> <p>15 the copies in the library; he only asked for two</p> <p>16 of the four; is that correct?</p> <p>17 A. That's correct.</p> <p>18 When he initially asked us for the</p> <p>19 two copies, we shadowed this from the collection</p> <p>20 so that it wasn't available to be loaned to</p> <p>21 anyone. We didn't want anyone coming in --</p> <p>22 because we were getting calls from law firms</p> <p style="text-align: right;">Page 90</p>	<p>1 A. Correct.</p> <p>2 Q. The public is not able to get these</p> <p>3 materials out of the library.</p> <p>4 A. To borrow the materials, correct.</p> <p>5 Q. We looked at some information today</p> <p>6 about the King-Devick student paper on ICO 3, if</p> <p>7 you take a look at that.</p> <p>8 A. Uh-huh.</p> <p>9 Q. And if you take a look at the second</p> <p>10 page of ICO, which is Bates stamped at the bottom</p> <p>11 ICO KDTTest 000022?</p> <p>12 A. Uh-huh.</p> <p>13 Q. You'll see that about a quarter of the</p> <p>14 way down the page there's a listing for the</p> <p>15 proposed King-Devick test; correct?</p> <p>16 A. Correct.</p> <p>17 Q. And it indicates that there's been 0</p> <p>18 circulations?</p> <p>19 A. That's correct.</p> <p>20 Q. Sitting here today as the senior</p> <p>21 director of -- sitting here today as the senior</p> <p>22 director of the library, does the library have any</p> <p style="text-align: right;">Page 92</p>
<p>1 everywhere asking us for the information, and so</p> <p>2 we shadowed it from our collection.</p> <p>3 Q. Understood. Can you explain the word</p> <p>4 "shadow"?</p> <p>5 A. It doesn't show up in the catalog. We</p> <p>6 still have it in our database but it's shadowed so</p> <p>7 that it's not available for people to see in the</p> <p>8 public.</p> <p>9 Q. Okay. Now, one of the things you</p> <p>10 mentioned before was, we were looking at the</p> <p>11 electronic records in Exhibits ICO 5 and 6 and you</p> <p>12 indicated that these records are available to the</p> <p>13 public; is that right?</p> <p>14 A. They're available for the public to</p> <p>15 see, yes.</p> <p>16 Q. And that is my question. But that</p> <p>17 does not mean that the materials that the record</p> <p>18 indicates you own or you possess are available for</p> <p>19 the public to see; correct -- let me ask a better</p> <p>20 question.</p> <p>21 The public is only able to see the</p> <p>22 fact that you have this in your collection.</p> <p style="text-align: right;">Page 91</p>	<p>1 record that the King-Devick copies put on reserve</p> <p>2 were ever lent out?</p> <p>3 A. The 2015 is missing. I don't have</p> <p>4 that information. But based on the rest of these,</p> <p>5 it has not been checked out.</p> <p>6 Q. And this record, you'll agree, only</p> <p>7 goes back to 2014; correct?</p> <p>8 A. Correct.</p> <p>9 Q. Do you have any record that the</p> <p>10 reserve copies were ever lent out or taken out by</p> <p>11 a student prior to 2014?</p> <p>12 A. I don't.</p> <p>13 And we cannot connect checkouts to</p> <p>14 a specific patron. No integrated library system</p> <p>15 allows you to do that. So, in other words, if the</p> <p>16 FBI comes in and says someone's about to blow up a</p> <p>17 building and we need to know if they checked out</p> <p>18 this book, we cannot do that.</p> <p>19 Q. Okay.</p> <p>20 A. We cannot connect the patron to the</p> <p>21 checkout.</p> <p>22 Q. Let me just ask the question again. I</p> <p style="text-align: right;">Page 93</p>

<p>1 want to make sure.</p> <p>2 With that understanding, and I'm</p> <p>3 not asking about any specific patrons, do you have</p> <p>4 any record that any patron of the library has ever</p> <p>5 checked out the reserve copies of the King-Devick</p> <p>6 test?</p> <p>7 A. I can't answer that question. I only</p> <p>8 have it based on these reserve statistics.</p> <p>9 Q. Do you have any other records that</p> <p>10 would answer that question?</p> <p>11 A. At the present time, no.</p> <p>12 Q. So the answer to the question is it</p> <p>13 correct to say that you have no records stating</p> <p>14 that anybody ever checked out the King-Devick test</p> <p>15 from the library?</p> <p>16 A. That's correct.</p> <p>17 MS. CHENG: Objection.</p> <p>18 BY MR. KLUFT:</p> <p>19 Q. Just to follow up on that question.</p> <p>20 And that includes reserves; correct? You don't</p> <p>21 have any record of anyone actually taking out the</p> <p>22 reserve copy and looking at it?</p> <p style="text-align: right;">Page 94</p>	<p>1 STATE OF ILLINOIS)</p> <p>2 COUNTY OF C O O K)</p> <p>3 I, Donna M. Kazaitis, CRR, RPR, IL-CSR</p> <p>4 No. 084-003145, do hereby certify:</p> <p>5 That the foregoing deposition of CHRISTINE</p> <p>6 WEBER was taken before me at the time and place</p> <p>7 therein set forth, at which time the witness was</p> <p>8 put under oath by me;</p> <p>9 That the testimony of the witness and all</p> <p>10 objections made at the time of the examination</p> <p>11 were recorded stenographically by me, were</p> <p>12 thereafter transcribed under my direction and</p> <p>13 supervision and that the foregoing is a true</p> <p>14 record of same.</p> <p>15 I further certify that I am neither counsel</p> <p>16 for nor related to any party to said action, nor</p> <p>17 in any way interested in the outcome thereof.</p> <p>18 IN WITNESS WHEREOF, I have subscribed my name</p> <p>19 this 8th day of December, 2018.</p> <p>20</p> <p>21 <u>DONNA M. KAZAITIS, IL-CSR, RPR, CRR</u></p> <p>22 Registered Professional Reporter Certified Realtime Reporter</p> <p style="text-align: right;">Page 96</p>
<p>1 A. I do not have, right, that's correct.</p> <p>2 MR. KLUFT: Do you want to take a</p> <p>3 little break and then we can see if either one of</p> <p>4 us has any more questions?</p> <p>5 MS. McCALLION: Yeah, sure.</p> <p>6 THE VIDEOGRAPHER: We are now going</p> <p>7 off the record at 11:15 a.m.</p> <p>8 (A recess was taken.)</p> <p>9 MR. KLUFT: I have no further</p> <p>10 questions. Thank you very much.</p> <p>11 THE WITNESS: You're welcome.</p> <p>12 MS. CHENG: We have no further</p> <p>13 questions either. Thank you.</p> <p>14 THE WITNESS: Okay.</p> <p>15 (Said deposition was so concluded</p> <p>16 at 11:17 a.m.)</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p style="text-align: right;">Page 95</p>	<p>1 Christine Weber c/o</p> <p>2 NIXON PEABODY LLP</p> <p>3 70 West Madison Street, Suite 3500</p> <p>4 Chicago, Illinois 60602</p> <p>5</p> <p>6 Case: King-Devick Test, Inc., v. NYU Langone Hospitals, et al.</p> <p>7 Date of deposition: November 28, 2018</p> <p>8 Deponent: Christine Weber</p> <p>9</p> <p>10 Please be advised that the transcript in the above</p> <p>11 referenced matter is now complete and ready for signature.</p> <p>12 The deponent may come to this office to sign the transcript,</p> <p>13 a copy may be purchased for the witness to review and sign,</p> <p>14 or the deponent and/or counsel may waive the option of</p> <p>15 signing. Please advise us of the option selected.</p> <p>16 Please forward the errata sheet and the original signed</p> <p>17 signature page to counsel noticing the deposition, noting the</p> <p>18 applicable time period allowed for such by the governing</p> <p>19 Rules of Procedure. If you have any questions, please do</p> <p>20 not hesitate to call our office at (202)-232-0646.</p> <p>21</p> <p>22 Sincerely,</p> <p>Digital Evidence Group</p> <p>Copyright 2018 Digital Evidence Group</p> <p>Copying is forbidden, including electronically, absent</p> <p>express written consent.</p> <p style="text-align: right;">Page 97</p>

EXHIBIT 5

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

KING-DEVICK TEST INC., Plaintiff, vs. NYU LANGONE HOSPITALS, STEVEN L. GALETTA, and LAURA J. BALCER Defendants.	Civil Action No. 17-cv-9307 Honorable J. Paul Oetken, U.S.D.J Honorable Debra C. Freeman, U.S.M.J
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SUPPLEMENTAL DECLARATION OF ALLEN H. COHEN, O.D.

I, Allen H. Cohen, hereby declare as follows:

1. I am a licensed optometrist and a professor of clinical optometry at the SUNY College of Optometry. In the 1970's, I was an active member of the New York State Optometric Association ("NYSOA") and was part of a project team formed to develop an NYSOA Vision Screening Battery.
2. I submitted a declaration in this matter dated December 6, 2018. This is a supplement to that declaration.
3. In my earlier declaration, I stated that, as early as 1978, and in connection with my work on the NYSOA Vision Screening Battery, I obtained a document containing a copy of the King-Devick Test, which was part of a paper authored by Alan King and Steve Devick.
4. I no longer have that document.
5. I do not recall whether that document had a copyright notice on it.
6. I do not recall where I obtained that document or who provided it to me.

7. I do not recall whether I communicated with the authors of the King-Devick Test or someone else in order to obtain that document. Nor do I have any knowledge whether anyone else associated with the NYSOA Vision Screening Battery communicated with the authors.
8. As I stated in my earlier declaration, as early as 1979, copies of the King-Devick Test were made by the NYSOA in the process of studying the test for the NYSOA Vision Screening Battery.
9. I no longer have those copies.
10. During this period, I do not recall that I had any communications with the authors of the test regarding NYSOA's study of the test.
11. I have no knowledge whether or not the authors of the King-Devick Test knew that NYSOA was studying the King Devick Test or creating these copies.
12. As far as I can recall, the first time I met one of the authors of the King-Devick was recently, in or about the 2010's.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 12/28/2018 in New York, NY

Allen H Cohen OD

Allen H. Cohen OD

Allen H. Cohen